



Achieving Smarter Regulation

September 2011



Business Roundtable (BRT) is an association of chief executive officers of leading U.S. companies with over \$6 trillion in annual revenues and more than 14 million employees. BRT member companies comprise nearly a third of the total value of the U.S. stock market and invest more than \$150 billion annually in research and development — nearly half of all private U.S. R&D spending. Our companies pay \$163 billion in dividends to shareholders.

BRT companies give nearly \$9 billion a year in combined charitable contributions.

Copyright © 2011 by Business Roundtable

Achieving Smarter Regulation

Table of Contents

Executive Summary	1
I. Introduction	3
II. The U.S. Economy Needs Smarter Regulation	5
III. Smarter Regulation	7
IV. Federal Regulation Is a Shared Responsibility	11
V. Problems/Concerns with the Current Regulatory Process	12
VI. Recommendations for Improving the Regulatory Process	14
VII. Conclusion	18
Endnotes	19

Executive Summary

Federal regulation profoundly affects business in the United States.

Unfortunately, while regulation can be essential, during this time of economic challenges it has become all too apparent that specific regulations are often counterproductive and far too costly, with a detrimental impact on employment and job creation. The challenge is to have only regulations that are necessary and cost-effective.

The driving idea behind this report is simple and timely: By improving the regulatory process, the resulting regulations will better meet the needs of the American people in a way that does not impose unnecessary costs. Accordingly, building upon prior Business Roundtable reports and analysis, *Achieving Smarter Regulation* reaffirms time-tested recommendations and focuses on particular proposals that are most relevant today.

This report first outlines the major challenges posed by federal regulatory policy. Too often, regulations are too expensive and too rigid, hurting both innovation and competitiveness. The overall regulatory environment, especially in light of many regulations' heavy compliance burdens, too often fails to produce the certainty that business needs to invest and create jobs.

Second, this report lists key principles that should guide a well-functioning regulatory process. For example, by encouraging early public engagement and ensuring that agencies use quality information and engage in objective, common sense analysis, a smarter regulatory process can maximize the efficacy of regulations and minimize their costs. Meaningful oversight by the Office of Management and Budget is essential.

Third, this report explains that the regulatory process is a shared responsibility among all branches of government and the public. To achieve essential reform, all stakeholders must work together to implement smarter regulatory policy.

Fourth, this report explains particular concerns about the current regulatory process. For instance, agencies do not always conduct or adhere to cost-

benefit analysis. Nor do they always use the best available data and scientific methodologies. Courts are sometimes overly deferential to agencies in certain contexts. And in recent years, problems with the federal permitting process have also come to the fore.

Finally, this report sets forth four specific reforms to meet those challenges including: stronger requirements for objective analysis, including for rules issued by “independent” agencies; more and earlier agency disclosure of the costs of proposed regulations; updates to the Administrative Procedure Act to require more rigor in the promulgation of the key subset of major rules that impose the greatest economic burden; and streamlining the permitting process.

By implementing these reforms in legislation and with a spirit of cooperation, the regulatory process can be made more cost-effective and of higher quality for the American people and can accomplish necessary objectives in a better, more transparent and more efficient way than some of the highly problematic regulations of recent years.

I. Introduction

Federal regulation of business has a profound impact on the public, on business investment and on U.S. competitiveness. Regulations on business impose costs that are like hidden taxes: not apparent but nevertheless significant in their impact on businesses, consumers and workers. Even a nonsignificant regulation adds to the growing cumulative burden of regulation, and this cumulative burden has a negative impact on jobs and the economy. The challenge is to have only regulations that are actually necessary and to design regulations to achieve worthwhile objectives at the lowest cost.

In 1994, Business Roundtable (BRT) issued *Toward Smarter Regulation*, which described problems with the regulatory process and recommended specific solutions, many of which were considered and debated in the chambers of Congress and the White House.¹ Although some progress was made, the underlying concerns remained. In the last few years, proposed and anticipated rulemakings at the federal level have alarmed the business community, shining a spotlight once again on the need for regulatory reform.

As BRT more recently explained in December 2010, “the success and profitability of U.S. companies — and their subsequent ability to invest in new jobs and new solutions — has been threatened by inflexible and cumbersome regulations in the financial services, environmental and health care sectors.”² Consequently, BRT revisited *Toward Smarter Regulation*, and the result is this report — a reaffirmation of the earlier recommendations with a focus on a few specific proposals deemed to be most relevant and appropriate in today’s economic and political climate.

This report (1) outlines the major challenges that federal regulation currently poses to U.S. businesses and domestic jobs; (2) proposes an optimal version of an improved regulatory process, referred to as “smarter regulation”; (3) describes the federal regulatory process as a shared responsibility among different branches of government and the public, including the business community; (4) presents a list of problems with the current regulatory system; and (5) recommends specific process reforms that, if implemented, can achieve “smarter regulation.”

The title of this report — *Achieving Smarter Regulation* — is significant in that the underlying problems are more apparent and more acute today than they were 17 years ago, and many of the proposed solutions — such as cost-benefit analysis — have been proven to improve regulation. With the learning of the last two decades, and the major economic challenges currently facing our country, the time for debate is past; now is the time for adoption and implementation of smarter approaches to regulation.

II. The U.S. Economy Needs Smarter Regulation

Since *Toward Smarter Regulation* was issued in 1994, the U.S. economy has undergone significant changes, and it continues to face global challenges. During the last year, BRT has highlighted a number of specific planned regulations that would have a major adverse impact on the U.S. economy.³ The interaction between federal government actions and the economy is even more important now than in the past. Federal regulation, in particular, poses four major challenges to U.S. businesses:

- ▶ **A cost challenge.** Regulations are expensive. Every year, federal agencies issue thousands of new regulations, imposing a cumulative cost of more than \$1.7 trillion annually, according to a study sponsored by the Small Business Administration. Individual rules can impose costs of hundreds of millions of dollars — or even billions of dollars — on regulated parties. Moreover, while any individual regulation might be cost-effective, the cumulative impact of *all* regulations can be anything but.

In addition, if U.S. companies face costs that foreign competitors do not, then it is harder for them to successfully sell products. Agencies, however, are often blind to the effect that regulations have on competitiveness. The best regulations/regulatory programs help provide certainty for business investment decisions while achieving the regulatory objective in a cost-effective and efficient manner and in a manner that achieves a high compliance rate.

- ▶ **An innovation challenge.** Business works when companies can experiment and try new things. Agencies, however, often impose rigid one-size-fits-all requirements that cut off promising opportunities, or they impose overly prescriptive rules that prevent better solutions. Likewise, resources spent complying with ill-designed regulations are by definition not spent on developing the products of tomorrow.
- ▶ **An investment challenge.** The regulatory process creates uncertainty that undermines investment, growth and job creation. If companies do not know what regulators will do, they understandably are reluctant to undertake

costly investment. Likewise, agencies often take too long to give permission for regulated parties to act — in part because they are focused on broad rulemaking objectives. The current regulatory system fosters uncertainty and so hampers growth and job creation.

- ▶ **A compliance challenge.** Regulating is easier than complying with regulations. Mandates are easy to promulgate but often difficult to achieve, particularly when they are confusing or poorly drafted. Some regulations are “technology forcing,” meaning that they can be met only by solutions that do not yet exist. Moreover, the volume and complexity of regulations can make for a bureaucratic nightmare, especially as different agencies with overlapping jurisdiction all regulate the same subject matter. Extraordinary resources are spent annually ensuring that regulations are obeyed.

III. Smarter Regulation

Government intervention in the economy may sometimes be necessary to achieve desirable goals such as a cleaner environment, safer working conditions and safer products. In some instances, specific regulations have been well conceived and reasonably implemented. These efforts have produced substantial benefits for the country and the American people.

And yet, even with the best of intentions, government is simply not allocating limited resources in a cost-effective manner. Despite a dramatic increase in environmental, health and safety regulation, experience has taught us that often our nation's regulatory efforts have been more costly and less effective than they could have been. Moreover, the enormous costs of federal and state regulations exert a heavy drag on the economy. They depress wages, stifle productivity and economic growth, drive up prices, and impede innovation. They also burden federal, state and local governments. In our increasingly global economy, excessive regulation seriously undermines the competitiveness of U.S. businesses. Ultimately, the American public suffers.

As the country embarks on a massive new wave of regulations ... it is imperative that the regulatory process be improved to avoid problems of the past.

Beyond the problems caused by the rising costs of government regulation, the regulatory process itself has become unduly rigid, unresponsive, arbitrary and inconsistent. These problems have sparked increasing concern about the rationality of the regulatory process and a growing determination to do something about it. In April 2011, for example, BRT highlighted a number of individual current regulations that presented significant problems.⁴

As the country embarks on a massive new wave of regulations designed to address significant issues in health care and the financial sectors, as well as many new regulations involving the energy, transportation and labor sectors (among others), it is imperative that the regulatory process be improved to avoid problems of the past while ensuring that our limited resources are targeted prudently.

“Smarter regulation” equates to an improved quality control system for federal regulation. The following components do not guarantee good regulatory outcomes, but they increase the likelihood that a regulation will direct resources efficiently to achieve its objective.

Public Engagement

Information gathering is critical to the development of a regulation or a change in regulation, and therefore agency interaction with those in possession of relevant information is also critical. Early engagement by the agency with the affected regulatory community is to be encouraged.

There are many ways an agency can engage with stakeholders. One common mechanism is the public notice-and-comment process for so-called “informal rulemaking.” However, even when that process is used, it would be desirable for an agency to seek earlier engagement with the business community and others prior to development of a proposed rule, especially when seeking a better understanding of the sector and when gathering information/data needed for regulatory development. Numerous methods are available to do that and ought to be employed more often. As the agency gathers information and receives public comment, the information and comments can be made publicly available in real time, thus fostering informed opinion.

For existing regulations, agencies should have mechanisms in place to receive information and feedback from the regulated community and to make improvements, as needed, to the underlying regulation.

Quality Information

Regulations should be based on the best available information, and the information should be of sufficient quality. Agencies should be held accountable for the quality of the information upon which regulations are based. The public ought to have a reasonable opportunity to identify when information is flawed and to obtain its correction. On scientific and technical matters, agencies should be required to use the best available scientific information and methodologies and, where appropriate, create incentives for the development and use of such information.⁵

Objective Analysis

When considering alternative approaches to regulation, an agency should rely on an objective analysis of benefits and costs along with a clear description of uncertainties in this analysis. Executive Order 12866 requires that certain covered agencies develop a cost-benefit analysis for each economically significant regulation, and agencies are free to develop such analysis for other types of regulation. The Small Business Regulatory Enforcement Fairness Act (SBREFA) requires analysis of impact for rules that affect a substantial number of small businesses. In these cases, it is imperative that impact analysis be objective and based on the best available information. Such an analysis is valuable both prospectively and retrospectively and when comparing/benchmarking U.S. regulations against those of other countries.

Methodologies should be continuously improved to assess the impact of significant regulations on productivity, wages and economic growth, as well as any adverse impact on jobs and international competitiveness in industries that bear the burden of regulation.⁶

Consideration of Costs and Benefits

An agency should promulgate a rule only when it has determined that the benefits justify the costs. This principle is part of Executive Order 12866, and there has been considerable experience with its application. Because not all benefits and costs can be quantified, there will be situations in which an agency will make this determination where the quantitative costs exceed the quantitative benefits. In such cases, the agency should at a minimum explain its reasoning as part of the rulemaking record. More generally, agencies should ensure that rules successfully address actual problems in a cost-justified manner and with the least costly alternative that will address the problem.

Expert Oversight

Congress often relies on the expertise of an agency to develop regulations. It is appropriate for such agency work, and the assumptions and data that underlie it, to be scrutinized by experts outside the agency to ensure its accuracy and objectivity. Under Executive Order 12866, the President has given the Office

of Management and Budget (OMB) responsibility for regulatory review and interagency coordination. It is critical that OMB devote sufficient resources (i.e., the quantity and quality of its staff) to implement this mandate effectively. Significant agency guidance documents and policies developed postregulation warrant special scrutiny, as they may be used as *de facto* regulation.

Another role of effective oversight is the need for coordination among agencies. Coordination should be improved to eliminate inconsistencies, duplication and unnecessary regulatory burden, as well as to coordinate the dates on which new rules take effect.⁷

Legislative Accountability

Congress plays a key role in the regulatory process and therefore is accountable in part for regulations that arise from legislation. Congress should take care when writing legislation that creates or modifies a regulatory program. For example, Congress should require that agency regulations be informed by considerations of direct and indirect costs and benefits. Congress should also clarify the conditions under which a regulatory program will begin and end, including the threshold for when regulation is appropriate. Congress should also make clear those aspects of administrative law that are judicially reviewable. In some instances, the authorizing statute and its subsequent regulations do not reflect current market conditions and circumstances. This is a particular concern in sectors where science/technology changes rapidly. Such outdated statutes and regulations should be modernized.

After an agency develops a regulation, it is appropriate for Congress to ensure that the agency is acting within its statutory authority. Any subsequent congressional action on an agency rule (approval or disapproval) should be constitutional, should not preclude judicial review by stakeholders, and should not create perverse incentives for agencies to work around the intent of Congress. It is certainly appropriate for Congress to consider ways to better exercise its oversight role for federal regulation by the agencies to whom Congress has delegated its own authority.

IV. Federal Regulation Is a Shared Responsibility

The President, Congress, the regulatory agencies, the courts, state and local governments, and the public — including the business community — have a shared responsibility in the development, implementation and overall effectiveness of, and compliance with, federal regulation.

- ▶ Congress provides the authority for federal agencies to regulate and defines the boundaries within which regulatory agencies must operate.
- ▶ The regulatory agencies use their expertise to develop specific regulations within their statutory authority and oversee implementation and compliance.
- ▶ The President manages the regulatory agencies and coordinates their regulatory efforts.
- ▶ The courts ensure that specific regulations are appropriate given the underlying statutory authority.
- ▶ State and local governments sometimes serve as partners with federal agencies in the development, oversight and enforcement of federal regulation. And sometimes state and local governments must comply with federal mandates, with or without commensurate federal funding.
- ▶ The public feels the impact of federal regulation of business in terms of its costs and benefits, which include effects on jobs and the economy. The public also provides critical information to agencies for the development and modification of regulations.

Because regulation is a shared responsibility among the different branches of government, it is seldom appropriate to attribute regulatory success or failure to just one part of the government. It follows logically that proposed regulatory reforms that focus on just one branch of government are not going to resolve all regulatory concerns by themselves.

V. Problems/Concerns with the Current Regulatory Process

A number of particular concerns plague the functioning of the rulemaking process in a wide variety of executive branch and “independent” agencies.

First, regulations sometimes are not based on sound science and/or quality data. A recent report from the National Academy of Sciences included harsh criticism of the Environmental Protection Agency (EPA) program to estimate chemical risk (i.e., the IRIS program). Though hundreds of billions of dollars can turn on what an agency does, major rules (having an annual impact on the economy of \$100 million or more) sometimes provide little assurance that valid science and quality data were used. A recent EPA proposed rule to control hazardous air pollution from industrial boilers included standards based on nonrepresentative data, a fundamental mistake acknowledged by EPA (and remedied in the final rule).

Second, agencies do not always conduct/adhere to cost-benefit analysis.

The Obama Administration has continued to use the longstanding Executive Order 12866, which requires that agencies “assess both the costs and the benefits of [an] intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs.”⁸ Although once controversial, cost-benefit analysis is now considered a useful tool for saving lives and directing limited resources in the most effective manner.⁹ Yet there continue to be examples that raise legitimate concerns about adherence to cost-benefit considerations. For example, the Department of Transportation (DOT) conceded that its Positive Train Control and Automobile Roof Strength rules had costs that exceeded their benefits by large amounts, and in the last few months of 2010, DOT proposed two more rules whose annual costs would exceed \$1 billion per year despite producing benefits that would be less than half the costs.¹⁰ EPA conducted no cost-benefit analysis at all for its Endangerment Rule for greenhouse gases, which is one of the most far-reaching and economically consequential regulatory actions in American history.¹¹ OMB recently reported that in 2010, agencies quantified both benefits and costs for only 27 percent of major rules.¹²

Third, regulated parties are not always given an opportunity to criticize agency record materials or file rebuttal comments. When the notice-and-comment process is followed, it often does not work as well as it could. One reason is that after an agency opens up a proposed action for public comment, it seldom gives regulated parties a chance to respond to comments filed by others. At least for major rules, there is sometimes too little process and concern for accuracy.

Fourth, when conducting judicial review, courts are highly deferential to agencies. Courts in some important instances have become overly deferential to agencies. For instance, agencies once used formal rulemaking when dealing with complex issues, but in *United States v. Florida East Coast Railway Co.*, the Supreme Court held that deciding when to use formal rulemaking is generally subject to agency discretion.¹³ Likewise, in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, the Supreme Court held that courts must take a hands-off approach and defer to an agency's choice of procedure.¹⁴ In a more general way, *Chevron*¹⁵ and *Seminole Rock*¹⁶ deferences to the agency's own interpretation of the law are powerful weapons in an agency's litigation arsenal. While it would not be desirable to make judges into discretionary policy administrators, the upshot from having too wide a range of deferential doctrines is that judicial review in some instances does not provide adequate assurance that an agency has objectively evaluated the premises and consequences of its rulemaking choices.

Fifth, the federal permitting process is unduly lengthy and time consuming, especially for new facilities/projects. Many job-creating projects, especially those involving manufacturing, energy and infrastructure, require federal permits and approvals (in addition to state and local permits). The requirements for submitting those permits are extensive and demand a significant commitment of resources at the outset. But once submitted, those permits are increasingly subject to delays both at the agencies and in the courts. Federal permits are in many instances not coordinated among agencies and often not subject to deadlines or prioritization. Even worse, even after issuance, they are sometimes subject to litigation that itself has no deadline, even when the litigation is lacking in merit. For example, the six-year statute of limitations under the National Environmental Policy Act means that project opponents can wait a significant time and then sue to delay work on a project.

VI. Recommendations for Improving the Regulatory Process

At this juncture, smarter regulation is not just desirable, but necessary. According to Andrew Liveris in *Make It in America: The Case for Reinventing the Economy*, “Regulations are beneficial only when they’re clear, consistent and wise.”¹⁷ To make that sensible observation a reality, three key principles of smarter regulation should animate the reform process. Regulations should: (1) be made as objectively as possible; (2) be promulgated only to address a well-defined problem that represents a failure of markets or institutions that can reasonably be fixed by new rules; and (3) always be designed using the most efficient solution to achieve the defined objective.¹⁸ In other words, agencies should always ask themselves whether a regulation is necessary as demonstrated by the data and, if so, whether there is a less burdensome way to accomplish that specific objective.

A robust and much-needed debate is under way about various approaches to reforming the regulatory process. Congress has held a number of important hearings on this topic this year, and several members have introduced reform proposals. Without speaking to each of these many proposals, some stand out as consistent with smarter regulation while providing benefits in both the short and the long run. These should be considered high priority for enactment/implementation:

The government should objectively analyze the costs and benefits of proposed and final major rules from all agencies, including “independent” regulatory commissions. Under Executive Order 12866, “covered” agencies must conduct a cost-benefit analysis for each economically significant rule (e.g., those imposing more than \$100 million in annual costs or benefits) and provide this economic analysis to OMB for review. The executive order excludes certain “independent” agencies (e.g., the Securities and Exchange Commission, Federal Communications Commission, Consumer Product Safety Commission, Federal Energy Regulatory Commission, Federal Trade Commission, and others), even though such agencies are responsible for a large share (typically 20 percent) of the most costly rules. Cost-benefit analysis, along with OMB review, is needed for regulatory proposals coming from these agencies to better ensure that alternatives are identified and evaluated appropriately. It is imperative that estimates of costs and benefits be done *objectively*. Without an objective

(unbiased) estimate of both costs and benefits, regulatory analysis is meaningless. Furthermore, objective analysis is fundamental to many of the major regulatory reform proposals (regulatory budget, expanded analysis of regulatory impact on small business, congressional approval of major rules, unfunded mandates reform, etc.) being raised and debated today.

One valuable way to ensure objective analysis is to have a credible, independent party perform the analysis rather than the regulatory agency itself. Where such an approach is not practical, another option is to have a credible, independent party review and critique the agency analysis.

For example, the National Academy of Sciences has criticized EPA's process for assessing risk and recommended fundamental changes to the agency's program. EPA should not move forward with that program until it makes the recommended changes. The independent review should induce the agency to rely on objective data and analysis.¹⁹

Agencies should publicly disclose the estimated costs of planned regulatory actions early in the regulatory process and with greater specificity.

Agencies should publicly disclose the estimated costs of planned regulatory actions early in the regulatory process and with greater specificity (e.g., less than \$50 million, \$100 million, \$500 million, \$1 billion, \$5 billion, \$10 billion, \$50 billion, etc.). Today, almost all agencies disclose whether a planned action will be "major" (generally having an impact of \$100 million or more on the economy). Although useful, this approach is outdated, having been imposed 30 years ago when there were few, if any, billion-dollar rules. Today, agencies are issuing rules that are estimated to impose costs in the tens of billions of dollars. Our old and simplistic system needs modernization. If the public does not know the magnitude of a proposed regulatory action, then it is difficult to focus public attention on the most significant rulemakings. Accordingly, such basic information should be provided earlier in the process and with greater specificity, as well as with an opportunity for regulated parties and the public to give agencies input as to the accuracy of their cost estimates.

Congress should consider changes to the Administrative Procedure Act (APA), particularly relating to the content of the rulemaking record and greater judicial scrutiny of that record. Major rules involving more than \$100 million per year are a distinct subset of the overall flow of federal regulations — fewer than 1 percent of the rules issued annually — but they account for

a majority of the identified costs and sometimes involve billions or even tens of billions of dollars of impact on our economy. More careful development of a major rule before it becomes final (e.g., a hearing on the record) will make it more defensible and therefore lessen the resources spent on litigation and judicial review. Major rules should be subject to more administrative process to avoid agency error and unnecessary harm to our economy and jobs. This means restoring the original purpose of the APA to allow affected parties some form of a hearing when the consequences are great and enabling judicial review to provide a “check and balance” on the erroneous exercise of the authority delegated to agencies, as well as agencies’ legal determinations about the scope of their own jurisdiction. For instance, some degree of formal rulemaking should be available for the most costly and significant regulations, as formal rulemaking “on the record” both requires and facilitates more careful judicial review. By allowing cross-examination of key agency assertions and reviewing these rules under a more searching standard of review, the accuracy of the facts and the quality of these rules will improve for those rules that **matter most to our economy and to job creation**.

The federal government should streamline the permitting process for siting and operating a new facility/project. A more certain and speedier process will enhance U.S. competitiveness and create jobs. One component toward achieving this recommendation is to create a federal office responsible for coordinating and expediting permit applications across the federal government.

* * * *

These recommended reforms should not — and are not intended to — make the regulatory process cumbersome and unduly lengthy, but they should — and are intended to — create quality rulemakings that improve the functioning of government and serve the public interest. Well-managed agencies can conduct rulemaking with better procedures in a timely manner.

Reforms, of course, should be tailored to the type of rulemaking. That is, the resources required to implement such reforms should be commensurate with the importance and/or impact of the rulemaking and the nature of the issues at stake. Major rulemakings, such as those involving more than \$100 million of annual costs to our economy, certainly warrant improvements to the process to

ensure the accuracy and objectivity of the information used to promulgate them and the efficacy, efficiency and fairness of the rules that are issued. Everyone will benefit from smarter regulation.

VII. Conclusion

In the 17 years since BRT issued its call for regulatory reform, *Toward Smarter Regulation*, some points of contention have been resolved. For example, there is no longer a debate over whether regulatory agencies should conduct cost-benefit analysis for major rules because the technique has been widely accepted and has been credited with improving specific regulations.

By and large, however, the proposals contained in *Toward Smarter Regulation* have not been fully adopted, which is unfortunate because all of the recommendations remain applicable today, in some respects more than ever. The importance of regulation with regard to our national economy cannot be overlooked. The President and the Congress should seize the moment, enact the aforementioned reforms and achieve smarter regulation. The result will be positive for U.S. jobs and competitiveness. We can and must achieve our regulatory objectives at lower cost and with fewer adverse consequences for jobs, for innovation and for U.S. competitiveness.

Endnotes

- ¹ Business Roundtable, *Toward Smarter Regulation* (1994), available at <http://businessroundtable.org>.
- ² Business Roundtable, *Roadmap for Growth* (Dec. 8, 2010), available at <http://businessroundtable.org>.
- ³ See, e.g., Business Roundtable, *Major Regulations/Issues of Concern* (April 12, 2011), available at <http://businessroundtable.org>.
- ⁴ *Ibid.*
- ⁵ *Toward Smarter Regulation* uses the term “sound science” to encompass the need to both use the best available information and objectively measure risk.
- ⁶ See *Toward Smarter Regulation*, recommendation 6.
- ⁷ See *Toward Smarter Regulation*, recommendation 7.
- ⁸ Exec. Order No. 12866 (Sept. 30, 1993); see also Exec. Order No. 13497 (Jan. 30, 2009) (adopting Exec. Order No. 12866).
- ⁹ John D. Graham, “Saving Lives through Administrative Law and Economics,” 157 *Univ. of Penn. Law Rev.* 2 (2008).
- ¹⁰ See 74 Fed. Reg. 22348, 22377–78 (May 12, 2009); 75 Fed. Reg. 2598 (Jan. 15, 2010); 75 Fed. Reg. 55852 (Sept. 14, 2010); 75 Fed. Reg. 76186 (Dec. 7, 2010).
- ¹¹ See 74 Fed. Reg. 66496 (Dec. 15, 2009).
- ¹² Office of Management and Budget, *2011 Report to Congress on the Benefits and Costs of Federal Regulations* (2011), p. 3.
- ¹³ 410 U.S. 224 (1973).
- ¹⁴ 435 U.S. 519 (1978).
- ¹⁵ *Chevron USA Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837 (1984) (holding that agencies may receive deference when interpreting statutes that they administer).
- ¹⁶ *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) (holding that an agency interpretation of its own regulation is “controlling ... unless it is plainly erroneous or inconsistent with the regulation”).
- ¹⁷ Andrew Liveris, *Make It in America: The Case for Reinventing the Economy*. Hoboken, NJ: John Wiley & Sons (2011).
- ¹⁸ *Toward Smarter Regulation* recommended the use of market incentives and performance standards over more prescriptive regulation. Such standards provide more flexibility to regulated entities and therefore are less likely to impede innovation and cost-effective compliance.

¹⁹ There are several other ways to promote objectivity, including developing standard methodologies to be used by all agencies when estimating benefits and costs and the uncertainties in these estimates, allowing other agencies to conduct the analysis jointly with the issuing agency, ensuring that OMB (and/or Congress) has the resources to evaluate the analysis, subjecting the preliminary analysis to public comment, requiring objective analysis in the underlying statute providing authority for the regulatory program, permitting evidentiary hearings about the data and assumptions used, and/or requiring the analysis to be part of the rulemaking record for a “more searching” judicial review process. These differing approaches, alone and in combination, also should be considered to determine the best way to ensure objectivity.



*Printed on recycled paper and
with vegetable-based inks.*

1717 Rhode Island Avenue, NW
Suite 800
Washington, DC 20036-3023

Telephone 202.872.1260
Facsimile 202.466.3509
Website brt.org

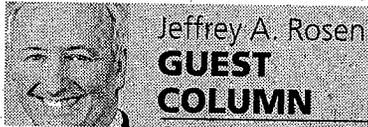
OPINIONS

HERE'S HOW YOU CAN SHARE YOUR OPINION

LETTERS TO THE EDITOR: E-mail letters to letters@enquirer.com, or send to Enquirer Opinions Page, 312 Elm St., Cincinnati, OH 45202; e-mail is preferred. Include your name, address, community and day phone. Letters may be edited for space and clarity, and may be published or distributed in print, electronic or other forms. To comment online: Cincinnati.Com/blogs/letters

'YOUR VOICE' GUEST COLUMNS: Send your column of 300 words or fewer, with a photo and a sentence about yourself (community, occupation, etc.), to letters@enquirer.com, "Your voice" in the subject line.

Rein on federal regulations will only benefit economy



Jeffrey A. Rosen
**GUEST
COLUMN**

With the nation's economy still in a slump, Sens. Rob Portman, R-Ohio, and Mark Pryor, D-Ark., are leading a bipartisan effort to create a smarter regulatory environment for American employers, workers, and consumers. Their recent proposal, the Regulatory Accountability Act, is a thoughtful solution to a problem. Sensible regulations can promote important public goods. But as President Obama recently acknowledged, excessive regulation can place "unreasonable burdens on business – burdens that have stifled innovation and have had a chilling effect on growth and jobs."

The Regulatory Accountability Act addresses this problem by

building economic reality-checks into the process that regulators use to issue new red tape. The bill's primary focus is the "major rule" category – the 50 to 80 costliest regulations out of the nearly 4,000 federal rules issuing annually. Specifically, it would require agencies to evaluate the cost and benefits of new regulations, consider the potential impact on jobs and the economy, and choose the least burdensome approach. It would permit a judicial check on an agency's analysis of costs and benefits.

In response to this effort, University of Cincinnati law professor Joseph Tomain took to these pages to proclaim "four reasons (the) bipartisan accountability act will fail" (Nov. 1). The failures lie only in Prof. Tomain's analysis. Among several erroneous claims, the following four fallacies are worth highlighting:

■ First, Tomain asserts that

"transparency goes out the window" with this bill. Just the opposite is true. The Portman-Pryor plan opens the regulatory process to greater sunlight at nearly every stage. It invites early public participation, requires agencies to reveal the data they use, and allows the White House's regulatory oversight office (called "OIRA") to place its views on new regulations directly in the agency's public record.

■ Second, Tomain takes issue with a recent estimate that federal regulations cost \$1.75 trillion annually. He fails to mention that the source of the estimate is not the bill's sponsors, but a 2010 study commissioned by the Small Business Administration. Tomain refers to a lower White House cost estimate, but he omits the fact that it is based on a narrow sliver of all regulations – less than 5 percent of all regulations issued over a single 10-year period. Obama in August told

Congress that seven of his planned new regulations will each cost more than \$1 billion per year.

■ Third, Tomain argues that analysis of costs and benefits is a "weak tool" that hinders regulation. This criticism is at odds with the consistent use of a cost-benefit standard throughout 30 years of regulatory oversight by presidents of both parties. It is a valuable method to guide rational decision making. When we already have 290,000 federal employees at regulatory agencies, with a budget of \$54.9 billion, is it really too much to ask that major new rules do more good than harm? Tomain offers no alternative other than to "let government govern" – a meaningless tautology that would grow only our government, not our economy.

■ Fourth, Tomain absurdly claims that this bill will "increas[e] the costs of regulations." Not so. The bill specifically tells federal

agencies to tailor new regulations to impose the "least cost" possible to achieve the policy goals set out by Congress. New analytical requirements may require agencies to do more work on the front end to get new rules right. But the savings will be substantial and permanent. When a proposed new rule has more than a billion-dollar impact on our economy, isn't it important to get the facts right?

Sens. Portman and Pryor deserve high praise for working on a bipartisan basis to reform a regulatory system that too often imposes unnecessary costs on job creators and consumers. Their bill would be good for our economy, while still enabling sensible rules.

Jeffrey A. Rosen, an attorney in Washington, D.C., served as general counsel and senior policy adviser at the White House Office of Management and Budget.

November 2, 2011

The Honorable Lamar Smith, Chairman
The Honorable John Conyers, Jr., Ranking Member
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Re: H.R. 3010, the Regulatory Accountability Act of 2011

Dear Mr. Chairman and Ranking Member Conyers:

The undersigned practitioners and scholars in the field of administrative law, and former regulatory officials in the White House, OMB and federal agencies, have reviewed the provisions of H.R. 3010, the Regulatory Accountability Act of 2011. H.R. 3010 would reform the Administrative Procedure Act's rulemaking provisions to enhance the quality of federal regulation, enhance democratic accountability and oversight for administrative policymaking, and improve policy outcomes for the American people. We strongly support the Committee's effort to enhance the analysis, justification, transparency of, and participation in, federal rulemaking, and we respectfully request that the Committee include this letter in the record.

In its current form, the Administrative Procedure Act (APA) does not adequately regulate the federal rulemaking process. It does not obligate agencies to rigorously define and characterize the need for regulation. It does not require agencies to identify the costs of regulations – including both compliance costs and impacts imposed on the economy and general welfare. It does not require agencies to carefully identify and assess the benefits to be achieved by new regulations, and does not compel agencies to choose the least burdensome, lowest-cost regulation that would achieve the statutory objectives. In short, the APA does not necessarily ensure that agencies justify their regulations in accordance with the highest standards the public deserves. H.R. 3010 would correct this.

H.R. 3010's critics argue that the bill would impose new burdens on agencies, by interposing additional analytic hurdles before agencies could adopt new regulations. First, it is important to understand that the bill's regulatory standards, and its analytic and justification requirements, are not fundamentally new – they have been previously developed and applied in Executive Orders issued by Presidents Reagan, Clinton and Obama. The bill would effectively codify existing principles and standards from these Executive Orders in law. Second, while

agencies would surely take the codified legal standards and requirements very seriously, and thus experience somewhat greater compliance burdens, that is not necessarily unreasonable or unwarranted. We believe the American public would view such additional safeguards as appropriate.

To be clear, we do not oppose environmental, health, safety or economic regulation. Nor do we believe that only a regulation's *costs* should be carefully tabulated and weighed. We agree that the *benefits* of many well-designed regulations can obviously be highly valuable to society, and we recognize that sound regulations can certainly reflect benefits that include intangible, non-quantifiable values (such as environmental, moral, ethical, aesthetic, social, human dignity, stewardship and other non-pecuniary or practical factors).

Taken together, we believe that *all* such costs and *all* such benefits must be rigorously analyzed, assessed, justified and scrutinized before significant new rules are imposed on the public, the economy, affected parties and regulated entities. Quite simply, that is "accountability."

The heads of regulatory agencies exercise extensive delegated policymaking authority, but are not directly accountable to the public through the democratic process. Accordingly, it is entirely reasonable, appropriate and, indeed, essential, for Congress to (i) specify in law more stringent criteria for rulemaking, (ii) facilitate substantial Presidential oversight of agency regulations (including those promulgated by "independent" agencies), (iii) enable more robust public participation in the rulemaking process, (iv) require regulations to be based on more reliable data and other relevant inputs, and (v) provide for more effective judicial scrutiny of the final regulations.

Of course, Congress often delegates its policymaking power to agencies, and it is incontrovertible that agencies' rulemaking can often be as highly consequential and important to the public as the congressionally enacted laws themselves. But for that very reason, regulation must not be undertaken without very careful consideration and observation of the most stringent procedures and analysis. The fact that the bill's requirements would embody existing regulatory review duties and obligations (based on numerous Executive Orders) in the APA itself is not objectionable. Before regulatory agencies impose new burdens on the public and the economy, the agencies should spend the time and make the effort to make sure they get the balance right for the overall benefit of society.

Accordingly, we view the Regulatory Accountability Act as serving the public well by mandating in statutory text that new regulations be thoroughly and meaningfully justified. Indeed, to the extent feasible, we would recommend that Congress avail itself of the same cost-benefit analysis prior to enacting regulatory legislation so as to avoid imposing unjustified regulatory mandates that agencies cannot fully resolve in the rulemaking process.

As noted above, far from imposing partisan or ideologically divisive requirements, H.R. 3010 embodies and implements a longstanding, bipartisan consensus on the proper principles of regulatory review and reform: Presidents Reagan, George H.W. Bush, Clinton, George W. Bush and—most recently and emphatically—President Obama, have all issued or implemented Executive Orders calling for rigorous justification of the need for regulation, careful cost-benefit analysis before imposing new regulatory requirements, reliance on sound science, and selection of the least burdensome regulatory alternatives that meet the relevant statutory objectives.¹

H.R. 3010 would take those Executive Branch principles and codify them, thereby preserving in federal statutes the very values set forth in President Obama’s recent Orders:

- Our regulatory system must protect public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation.
- It must be based on the best available science.
- It must allow for public participation and an open exchange of ideas.
- It must identify and use the best, most innovative, and least burdensome tools for achieving regulatory ends.
- It must take into account benefits and costs, both quantitative and qualitative.
- each agency must, among other things:

¹ See, e.g., Executive Order Nos. 12291 (Reagan), 12866 (Clinton), 13563 (Obama), 13579 (Obama).

- (1) propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify);
- (2) tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations;
- (3) select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity);
- (4) to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt; and
- (5) identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public.
- Regulations shall be adopted through a process that involves public participation.
- each agency, consistent with Executive Order 12866 and other applicable legal requirements, shall endeavor to provide the public with an opportunity to participate in the regulatory process.
- each agency shall also provide, for both proposed and final rules, timely online access to the rulemaking docket on regulations.gov, including relevant scientific and technical findings, in an open format that can be easily searched and downloaded.

- Before issuing a notice of proposed rulemaking, each agency, where feasible and appropriate, shall seek the views of those who are likely to be affected, including those who are likely to benefit from and those who are potentially subject to such rulemaking.
- each agency shall identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public.
- each agency shall ensure the objectivity of any scientific and technological information and processes used to support the agency's regulatory actions.
- Wise regulatory decisions depend on public participation and on careful analysis of the likely consequences of regulation.
- Such decisions are informed and improved by allowing interested members of the public to have a meaningful opportunity to participate in rulemaking.
- To the extent permitted by law, such decisions should be made only after consideration of their costs and benefits (both quantitative and qualitative).
- Executive Order 13563 of January 18, 2011, "Improving Regulation and Regulatory Review," directed to executive agencies, was meant to produce a regulatory system that protects "public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation."
- Independent regulatory agencies, no less than executive agencies, should promote that goal.
- Executive Order 13563 set out general requirements directed to executive agencies concerning public participation, integration and innovation, flexible approaches, and science. To the extent permitted by law, independent regulatory agencies should comply with these provisions as well.

Indeed, the Regulatory Accountability Act would implement President Obama's recent call for "public participation and open exchange"² *before* a rule is proposed. Specifically, H.R. 3010 would create an Advance Notice of Proposed Rulemaking stage for major rules (\$100M+). In this early notice, the agency would identify the problem it wishes to address through regulation and articulate the specific legal authority for doing so; disclose its preliminary views on the direction of the prospective regulation, and provide information concerning possible regulatory alternatives; and invite the public to submit written comments on these issues. While this adds a step in the regulatory process, it is one that allows interested parties a greater opportunity to help the agency reach a sound outcome.

The bill would also obligate agencies to rely on better scientific and technical data. While agencies must exercise their expert judgment, it is impossible to argue against the proposition that they should use the best data and other inputs available. Affected parties can invoke judicial and administrative remedies to ensure that agencies rely on scientific and technical evidence that meets the standards of the Information Quality Act. This is, of course, consistent with President Obama's call for regulating "based on the best available science."³ This is unassailable. If agencies cannot disclose and defend the data they rely on as being the best available, they cannot possibly be confident enough in their regulatory analysis to impose new requirements on the basis of the data at their disposal.

The Committee may also wish to consider the possible application, or adaptation, of the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, in the regulatory context. In *Daubert*, the Court empowered federal judges to reject irrelevant or unreliable scientific evidence, thus providing the judiciary a mandate to foster "good science" in the courtroom and to reject expert testimony not grounded in scientific methods and procedures. Some federal agencies have been criticized for lacking a commitment to sound science. Too often, federal courts have accorded great deference to uphold agency decisions that may have been based on faulty scientific evidence or unsupported assumptions and conclusions.

Daubert principles could be applied to the review of agency rulemaking under the APA because these principles are consistent with the APA requirement that agencies engage in reasoned decisionmaking, would assure better documentation

² Executive Order No. 13,563.

³ Executive Order No. 13,563.

of agencies' scientific decisions, and would enhance the rigor and predictability of judicial review of agency action based on scientific evidence. This approach would be entirely congruent with the Regulatory Accountability Act's requirement that regulations be based on the best available science. Applying the Daubert principles in judicial review of agency action would allow courts to evaluate the scientific methods and procedures employed by agencies, but must not allow judges to substitute their own policy preferences or conclusions for those chosen by the agencies. The courts' review need not be heavy-handed; it can be both deferential and probing, ensuring that agencies formulate and comply with procedures tailored to producing the best results, while not dictating what those results must be in any given case.

Incorporating, or adapting, *Daubert* principles into administrative law would improve agency decisionmaking and enhance accountability. Agencies would be compelled to identify the most reliable and relevant scientific evidence for the issue at hand and disclose the default assumptions, policy choices, and factual uncertainties therein. Applying *Daubert* in the administrative context would refine judicial review of agency science, resulting in greater consistency and rigor.⁴

We also believe that it is reasonable that H.R. 3010 would expose more agency pronouncements, such as agency guidance documents, to more rigorous standards. Specifically, the bill would adopt the good-guidance practices issued by OMB in 2007 (under then-Director, and now Senator, Portman). Such agency guidance would be clearly noted as “non-binding,” and would not be entitled to substantial judicial deference.

The heart of the bill is to build cost-benefit analysis principles into each step of the rulemaking process — proposed rule, final rule, and judicial review. As noted earlier, these principles are drawn from Executive Orders issued by Presidents Reagan and Clinton and emphatically reaffirmed by President Obama. The bill would make those principles permanent, enforceable and applicable to independent agencies. Compliance with these codified requirements would be subject to judicial review.

⁴ See Raul & Zampa, “REGULATORY DAUBERT”: A PROPOSAL TO ENHANCE JUDICIAL REVIEW OF AGENCY SCIENCE BY INCORPORATING DAUBERT PRINCIPLES INTO ADMINISTRATIVE LAW,” available at [http://www.law.duke.edu/shell/cite.pl?66+Law+&+Contemp.+Probs.+7+\(Autumn+2003\)](http://www.law.duke.edu/shell/cite.pl?66+Law+&+Contemp.+Probs.+7+(Autumn+2003)).

Significantly, the bill would require agencies to adopt the “least costly alternative that will achieve the objectives of the statute authorizing the rule.” It permits agencies to adopt a more costly approach only if the agency demonstrates that the added costs justify the benefits and that the more costly rule is needed to address interests of public health, safety, and welfare that are clearly within the scope of the statute. This is consistent with the White House’s recent instruction to federal agencies to “minimize regulatory costs”⁵ and the President’s directive to “tailor regulations to impose the least burden on society.” (Exec. Order 13,563)

For high impact, billion-dollar rules, additional procedures would apply – which seems entirely reasonable given the resulting consequences for the public and the economy. Most importantly, affected parties will have access to a fair and open forum to question the accuracy of the views, evidence, and assumptions underlying the agency’s proposal. The hearing would focus on (1) whether there is a lower-cost alternative that would achieve the policy goals set out by Congress (or a need that justifies an higher cost than otherwise necessary); (2) whether the agency’s evidence is backed by sound scientific, technical and economic data, consistent with the Information Quality Act; (3) any issues that the agency believes would advance the process. Parties affected by major rules (\$100M+) would also have access to hearings, unless the agency concludes that the hearing would not advance the process or would unreasonably delay the rulemaking.

Following the hearing prescribed in the bill, high-impact rules would be reviewed under a slightly higher standard in court — so-called “substantial evidence” review. While this standard is still highly deferential to the agency’s judgments, it allows a court reviewing major rules to ensure that an agency’s justifications are supported by “evidence that a reasonable mind could accept as adequate to support a conclusion based on the record as a whole.”

We understand that these additional review and analysis requirements are not perfunctory and may not be easy for agencies to accomplish. However, we believe that because of the extensive delegation of essentially legislative authority from Congress and policymaking discretion that agencies exercise, and the substantial deference that agencies enjoy from the courts, the public deserves more analysis and justification before agencies acts. Moreover, we believe that the public also expects the President to influence and control rulemaking by all federal agencies, and thus we support greater centralized White House review of agency regulations

⁵ Cass Sunstein, *Washington Is Eliminating Red Tape*, The Wall Street Journal (Aug. 23, 2011).

– including independent agencies – on behalf of the President by the Office of Information and Regulatory Affairs at OMB (in the Executive Office of the President). We believe the bill, which clearly applies its regulatory standards to independent agencies, should also make clear that the President is responsible for, and entitled to review, the rules issued by independent agencies such as the SEC, CFTC, FCC, FTC, CPSC, CFPB, etc.

The need for such Presidential authority is manifest. For example, in a recent case before the U.S. Court of Appeals for the D.C. Circuit, *In re Aiken County*, the presidentially controlled Department of Energy and the independent Nuclear Regulatory Commission did not actually agree on the merits of how to handle nuclear waste at Yucca Mountain. This prompted Circuit Judge Brett Kavanaugh to explain why the lack of presidential authority and control is constitutionally and politically dubious. Quoting both Alexander Hamilton in the Federalist Papers and the Supreme Court in *PCAOB*, he wrote that “the issue created by *Humphrey’s Executor* is that the President’s decision on the Yucca Mountain issue is not the final word in the Executive Branch. In other cases, the issue created by *Humphrey’s Executor* is that it allows Presidents to avoid making important decisions or to avoid taking responsibility for decisions made by independent agencies. When independent agencies make such important decisions, no elected official can be held accountable and the people “cannot ‘determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall.’”

President Obama has acknowledged the importance of Presidential review of independent agency rulemaking in recent, July 11, Executive Order. (Executive Order, 13,579) His Order requests (but does not command) that the independent agencies to submit the regulations they issue to the same principles applicable throughout the parts of the Executive Branch for which he is directly accountable. Specifically, independent agencies are now asked to scrutinize existing and future regulations in accordance with cost-benefit analysis. He also asks them to assure that regulatory policy is cost-effective and protective of innovation and job creation. Perhaps most importantly, independent agencies should also make sure that there is a real problem that needs to be solved before regulating, and then choose the least burdensome regulatory alternative that prevents or abates that harm. The bill currently before Congress should thus make clear – not only that independent agencies are subject to the salutary standards of cost-benefit analysis and rigorous policy justification – but also, that the President has the power and responsibility to review and control all such Executive Branch rulemaking.

While we endorse the bill's proposed codification of regulatory standards, analytic criteria, and accountability principles, we would also recommend that Congress consider incorporating the prospectively duplicative provisions of the Regulatory Flexibility Act (with regard to cost-benefit analysis for small business) and the Unfunded Mandates Reform Act (with regard to cost-benefit analysis and minimization of burdens on states, tribes and private sector; though UMRA does not currently apply to independent agencies). Moreover, as previously noted, we also believe the bill should specifically authorize the President to oversee rulemaking by independent agencies. The President's responsibility to oversee independent regulatory agencies, like the Consumer Financial Protection Board, for example, would ensure that the regulations adopted by such agencies are in the overall best interest of the American people.

Thank you for considering our views.

Respectfully submitted,

Alan Charles Raul

Former Vice Chairman,

White House Privacy and Civil Liberties Oversight Board

Former General Counsel, U.S. Department of Agriculture

Former General Counsel, Office of Management and Budget

Former Associate Counsel to the President

C. Boyden Gray

Boyden Gray & Associates

Former Ambassador to the European Union

Former Counsel to the President

Former Counsel to the Vice President

James C. Miller III

Former Director of the Office of

Management and Budget

Former Chairman of the Federal Trade Commission

Former Administrator of the Office of Information

And Regulatory Affairs, OMB

David L. Bernhardt

Former Solicitor, Department of the

Interior

Adam J. White
Boyden Gray & Associates

Eileen J. O'Connor
Former Assistant Attorney General, Tax Division
U. S. Department of Justice

Daren Bakst
Director of Legal and Regulatory Studies,
John Locke Foundation

Jeffrey R. Holmstead
Former Assistant Administrator of the Environmental
Protection Agency for Air and Radiation
Former Associate Counsel to the President

Jeffrey Bossert Clark
Former Deputy Assistant Attorney General,
Environment & Natural Resources Division,
United States Department of Justice

David R. Hill
Former General Counsel,
U.S. Department of Energy

September 22, 2011

The Honorable Lamar Smith
United States House of Representatives
Washington, DC 20515

The Honorable Rob Portman
United States Senate
Washington, DC 20510

The Honorable Howard Coble
United States House of Representatives
Washington, DC 20515

The Honorable Susan Collins
United States Senate
Washington, DC 20510

The Honorable Collin Peterson
United States House of Representatives
Washington, DC 20515

The Honorable Mark Pryor
United States Senate
Washington, DC 20510

Dear Representatives Smith, Coble and Peterson, and Senators Portman, Collins and Pryor:

The undersigned groups strongly support your introduction of the Regulatory Accountability Act of 2011. Your bipartisan support for this bill makes clear that the need to update the 65 year old regulatory process transcends party affiliation.

Recognizing the precarious condition of America's economy and continued weakness in job creation, our members believe that regulations need to be narrowly tailored, supported by strong and credible data and evidence, impose the least burden possible, while still implementing Congressional intent. In addition, when agencies produce regulations that do not reflect these requirements, better mechanisms to hold them accountable are needed. The Regulatory Accountability Act of 2011 will restore these objectives to the regulatory process by:

- Increasing public participation in shaping the most costly regulations before they are proposed.
- Requiring that agencies must choose the least costly option unless they can demonstrate a need to protect public health, safety, or welfare.
- Giving interested parties the opportunity to hold agencies accountable for their compliance with the Information Quality Act.
- Providing for on-the-record administrative hearings for the most costly regulations to insure that agency data is well tested and reviewed.
- Restricting agencies' use of interim final regulations where no comments are taken before a regulation takes effect and providing for expedited judicial review of whether that approach is justified.
- Providing for a more rigorous test in legal challenges for those regulations that would have the most impact.

The Regulatory Accountability Act of 2011 builds on established principles of fair regulatory process and review that have been embodied in bipartisan executive orders dating to

at least the Clinton administration and will make the regulatory process more transparent, agencies more accountable, and regulations more cost effective. The Act will not affect any regulations that are already in effect.

We welcome the introduction of this bill and enthusiastically support it. We look forward to working with you on moving it forward.

Sincerely.

Alliance of Automobile Manufacturers
Aluminum Association
American Bakers Association
American Chemistry Council
American Farm Bureau Federation
American Forest & Paper Association
American Foundry Society
American Hotel and Lodging Association
American Machine Tool Distributors' Association
American Petroleum Institute
Associated Builders & Contractors, Illinois Chapter
Associated Builders & Contractors, Inc.
Associated Builders & Contractors, Rocky Mountain Chapter
Associated General Contractors of America
Associated General Contractors of California
Automotive Parts Remanufacturers Association
Brick Industry Association
Business Roundtable
Colorado Roofing Association
CTIA – The Wireless Association
Edison Electric Institute
Equipment Marketing & Distribution Association
Financial Services Forum
Industrial Energy Consumers of America
Industrial Supply Association
International Sign Association
International Warehouse Logistics Association
Irrigation Association
Marine Retailers Association of America
Metals Service Center Institute
National Association of Electrical Distributors
National Association of Home Builders
National Association of Manufacturers
National Association of REALTORS®
National Association of Wholesaler-Distributors
National Black Chamber of Commerce
National Club Association

National Council of Chain Restaurants
National Electrical Contractors Association
National Federation of Independent Business
National Funeral Directors Association
National Marine Distributors Association
National Mining Association
National Newspaper Association
National Retail Federation
National Roofing Contractors Association
National Stone, Sand & Gravel Association
North American Association of Utility Distributors
North American Die Casting Association
North American Equipment Dealers Association
NPES—The Association for Suppliers of Printing, Publishing and Converting Technologies
Nuclear Energy Institute
Outdoor Power Equipment and Engine Service Association
Portland Cement Association
Property Casualty Insurers Association of America
Small Business & Entrepreneurship Council
SouthWestern Association (farm, industrial/construction and outdoor power equipment
retailers)
SPI: The Plastics Industry Trade Association
U.S. Chamber of Commerce



THE HILL

Like 29k Follow

Search TheHill.com GO»

Advanced Search Options »

Home/News Campaign Business & Lobbying Opinion Capital Living Jobs Video Gossip: In The Know

BLOGS Briefing Room | RegWatch | Hillicon Valley | E2-Wire | Floor Action | On The Money | Healthwatch | Transportation | DEFCON Hill | Global Affairs |

Congress

GO TO THE HILL HOME »

Enter Email GO

- Home
- Senate
- House
- Administration
- Campaign
- Polls
- Business & Lobbying
- Sunday Talk Shows
- BLOGS
- Briefing Room
- RegWatch
- Hillicon Valley
- E2-Wire
- Floor Action
- On The Money
- Healthwatch
- Transportation
- DEFCON Hill
- Global Affairs
- Congress
- Ballot Box
- In The Know
- Pundits
- Twitter Room
- OPINION
- A.B. Stoddard
- Brent Budowsky
- Lanny Davis
- David Hill
- Cheri Jacobus
- Mark Mellman
- Dick Morris
- Markos Moulitsas (Kos)
- Robin Bronk
- Editorials
- Letters
- Op-Eds
- Juan Williams

THE HILL'S Congress Blog

Where lawmakers come to blog

Fishing for a reason to regulate

By Jeff Rosen, former general counsel, White House Office of Management and Budget - 04/10/13 10:30 AM ET

Tweet 0 Like 0 Send 0

- COMMENT
- EMAIL
- PRINT
- SHARE

This Thursday, when the Senate holds its hearing on President Obama's nomination of Gina McCarthy for EPA administrator, attention is likely to be focused on the many costly rules that EPA has issued during the last four years, and the additional ones now planned. During the president's first term, the administration issued more than 200 economically significant new rules each involving more than \$100 million in new annual costs -- a record high for any president's first term -- and EPA alone accounted for more than 25 new economically significant final rules, with annual costs in the billions of dollars by EPA's own estimates.

The administration has argued that these regulatory costs are justified, by asserting high "benefits" that exceed their costs. It is to the president's credit that he has continued to require cost-benefit analysis of major rules to ensure they do more good than harm, as presidents of both parties have required in the past. But with regard to EPA, what has been less noticed than the high cost of the agency's rules is that there is considerable reason to be skeptical about how EPA is assessing the benefits that it claims. Though environmental goals often deservedly command wide support, careful analysts have noted that EPA has overstated benefits and included things that ought not count at all. (See Dudley, 47 Business Economics 165, July 2012.) As one example, an ongoing action by EPA illustrates just how far agencies may go to find supposed "benefits" to justify new red tape.

In 2011, EPA proposed a new regulation governing the equipment that power plants and manufacturing facilities use to draw in water to prevent overheating. These water intake systems generally are not harmful to health or water quality, but EPA's staff expressed concerns primarily about their effect on larvae and forage fish -- commonly known as "bait". To reduce losses of such fish, EPA wants to require installation of advanced screens at 1,200 facilities and dramatically more expensive technologies to be decided later on a site-by-site basis.

EPA initially estimated that its preferred approach would impose \$466 million in annual costs on power plants and energy consumers, while producing only \$16 million in quantified benefits. With one dollar in costs for every three cents in fish "benefits", this did not look like a cost-effective rule.

RELATED VIDEOS

by Taboola



Stephen Colbert drops the act to help his sister



Stephen Colbert rips Joe Scarborough



Judd Gregg
 Christian Heinze
 Karen Finney
 John Feehery
CAPITAL LIVING
 Cover Stories
 Food & Drink
 Announcements
 New Member of the Week
 My 5 Min.
 W/Obama
 All Capital Living

VIDEO

HillTube

EVENTS

Video

CLASSIFIEDS

Jobs

Classifieds

RESOURCES

Mobile Site

iPhone

Android

iPad

Lawmaker Ratings

White Papers

Order Reprints

Last 6 Issues

Outside Links

RSS Feeds

CONTACT US

Advertise

Reach Us

Submitting Letters

Submitting Op-eds

Subscriptions



But then EPA got creative. The agency mailed a “survey” to several thousand households, most of whom did not even respond. Through a series of purely hypothetical questions, EPA asked people to put a dollar value on how fishbait and other aquatic organisms make them feel. The 18-page survey asked how much per month they might imagine paying to save “0.6 billion fish.” Two dollars a month? Three dollars? These sponsor-a-fish questions suggested that a couple bucks could save millions of tiny fish, with no benchmark to other environmental or economic priorities and no actual cost to the survey responders. Respondents were also asked how much they might imagine paying to improve the “condition of aquatic ecosystems” from “48 percent pristine” to “50 percent pristine” — for those who know what a 2 percent increase in pristine-ness looks like.

Perhaps EPA regulators found the results they were fishing for. Last summer, EPA published a notice showing that its “stated preference” survey supports increasing the estimate of fish “benefits” to \$2.2 billion per year. That’s about a 14,000% increase over the \$16 million estimate it put out last year. If one takes this new method seriously, it suggests that for every \$1 that Americans are willing to pay for fish on their dinner plate or on their hook, they are willing to pay another \$140 to know the bait are swimming freely and comfortably somewhere.

This not a credible basis to justify new regulation. In the past, the Office of Management and Budget, charged with overseeing the rule-making process, and leading economists have insisted on safeguards against using surveys that pose purely hypothetical questions, rather than asking about real economic choices that people make. This approach also breaks with EPA’s own prior limitation of assessing such intangible, “non-use values” only when looking at protections for endangered species like the humpback whale, but not for common and abundant wildlife like minnows and bait.

The results of EPA’s benefits “survey”, if adopted when EPA finalizes its rule this year, could be misused to justify more than \$2 billion per year in new regulatory costs under EPA’s preferred option, and nearly \$7.5 billion per year for an even more intrusive and costly option still under consideration. Energy businesses project that this could translate into up to \$4.5 billion per year in costs passed on to consumers in the form of higher electric bills — the last thing families and employers need in an economy that has been stalled for too long already.

Perhaps Senators should be asking the EPA nominee whether this proposed new approach to evaluating regulatory benefits provides a worrying glimpse into what the administration’s second-term regulatory game plan may look like, with dubious methods employed to expand the reach of regulation yet again. Hopefully not. Under EPA’s latest maneuver, there would be few new burdens that regulators could not claim to justify on paper through bogus assertions of “benefits”. Permitting this tactic would enable another substantial expansion of the regulatory state, at the continued expense of the private economy.

With our national economy unfortunately continuing to lag during the worst “recovery” in American history, the federal government should not be grasping for new excuses to impose higher regulatory costs. At a minimum, senators might ask the EPA nominee to commit the agency to using sound science, to use only valid measures of actual benefits, and to protect our environment in a reasonable way that avoids imposing unjustified costs on an economy that needs to get back to creating jobs and incomes rather than taking new regulatory actions that unnecessarily impede them.

Rosen is a lawyer in Washington, D.C., who previously served as general counsel at the White House Office of Management & Budget.

Tweet 0 Like 0 Send 0

FROM AROUND THE WEB

by Taboola

Panel approves assault weapons ban; Cruz, Feinstein get heated

Graham encouraged by Obama budget

[More Videos »](#)



CONGRESS BLOG

MOST POPULAR STORIES

Most Viewed Emailed Discussed

Small business opposes multinational corporations' tax avoidance

Affordable health insurance shouldn't be an oxymoron

Addressing budget constraints with innovation and creativity

Housing credit deserves to be protected

It's time to ban predatory pay day loans for good

[Blog Home »](#)

[Most Viewed RSS Feed »](#)

MORE ENERGY & ENVIRONMENT HEADLINES

- New EPA pollution rule another case of presidential overreach
- Now is the time to approve Keystone
- Keystone pipeline all risk and no reward

[More Energy & Environment Headlines »](#)

[Energy & Environment News RSS feed »](#)

CONGRESS BLOG TOPICS

Campaign »	Cardoza's Corner »
Civil Rights »	Economy & Budget »
Education »	Energy & Environment »
Foreign Policy »	Healthcare »
Homeland Security »	Judicial »
Labor »	Lawmaker News »
Politics »	Presidential Campaign »
Religious Rights »	Technology »
The Administration »	



BRIEFING ROOM

- GOP Sen. Risch downplays filibuster, says gun bill debate a 'good thing'
- Manchin, Toomey appear close to deal on background checks
- Cheney: US in 'deep doo doo' with North Korea

[More Briefing Room »](#)

CONGRESS BLOG

- Fishing for a reason to regulate
- Restoring financial flexibility in healthcare
- Homeowner insurance bill hurts taxpayers

[More Congress Blog »](#)

PUNDITS BLOG

- Straight talk about the wage gap
- GOP Cruzin' to a bruisin' with gun background check filibuster
- Bring back the real 'Crossfire'