REGULATORY REFORM: ARE REGULATIONS HINDERING OUR COMPETITIVENESS?

HEARING

BEFORE THE

SUBCOMMITTEE ON REGULATORY AFFAIRS

OF THE

COMMITTEE ON GOVERNMENT REFORM

HOUSE OF REPRESENTATIVES

ONE HUNDRED NINTH CONGRESS

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REGULATORY REFORM: ARE REGULATIONS HINDERING OUR COMPETITIVENESS?

WEDNESDAY, JULY 27, 2005

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON REGULATORY AFFAIRS,
COMMITTEE ON GOVERNMENT REFORM,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:30 a.m., in room 2247, Rayburn House Office Building, Hon. Candice Miller (chairman of the subcommittee) presiding.

Present: Representatives Miller, Westmoreland, and Lynch.

Staff present: Ed Shrock, staff director; Rosario Palmieri, deputy staff director; Dena Kozanas, counsel; Joseph Santiago and Erik Glavich, professional staff members; Alex Cooper, clerk; Krista Boyd, minority counsel; and Jean Gosa, minority clerk.

Ms. MILLER. The subcommittee will come to order.

I apologize for being late.

I think America is at a crossroads. We can continue down a path that weakens our international competitiveness, or we can recognize our responsibility for reducing the cost of doing business in the United States. America should be the very best place in the world to manufacture goods, to create jobs. We are here today to discuss some options that the Congress could consider for reforming our regulatory process. This hearing will provide us with an opportunity to evaluate existing initiatives, consider new proposals, and develop a regulatory reform agenda for the 109th Congress as well.

I certainly want to say how glad I am to have my colleagues Representatives Hayworth, Kelly, and Ney with us today. These are three Members of Congress who really do understand this issue, and they know how critical it is to improving our Nation. I want to thank you all for being here. I am also pleased to mention that my subcommittee colleague Representative Ginny Brown-Waite has proposed her own piece of legislation to address the issue of regulatory burden on the American public.

Regulation is one of the tools used by the Government to implement public policy. It is necessary because laws may lack the details required to address the various circumstances that they were designed to correct. Every year, over 60 Federal departments, agencies, and commissions dedicate actually over 240,000 full time employees to write and enforce regulations that range from allowing fireworks displays over rivers to registering food facilities to protect them from bioterrorism. Combined, these agencies annually issue thousands of new rules and their costs for regulatory operations

during fiscal year 2004 actually exceeded $39 billion, just to put it in perspective.

According to one estimate, the total regulatory burden on the American public exceeded $850 billion per year, which is almost the equivalent of what Americans pay in income taxes. Government regulations cost American small businesses 60 percent more per employee than the cost incurred by larger businesses. And, for every dollar devoted by the Federal Government to regulatory activity, American businesses spent $45 just to comply with those regulations.

At $8,000 per employee, domestic manufacturers assume almost twice the average cost for all U.S. industries. Workplace regulations alone cost manufacturers $2.2 million per firm per year, which is roughly about $1,700 per employee. Our global competitors of course do not have this large of a burden, so it is no wonder that our Nation continues to bleed jobs, unfortunately, to competing nations.

During the past 50 to 60 years, Congress and various Presidents have developed procedures to guide the Federal rulemaking process with the goal of reducing the amount of regulatory burden imposed on the American public and businesses. Those in favor of regulatory reform argue that Federal regulations are too costly, time consuming, complex, duplicative, burdensome, and intrusive for businesses and other regulated entities. However, there are those who would argue that regulatory reform efforts focus too much on the costs of regulations and do not focus enough on the benefits derived from them.

Make no mistake, I think everybody on this panel, everybody in this room is a person that wants to protect the environment, the health, and safety of the workers. I am a defender of regulations that watch over consumers and safeguard our natural resources. I spent actually almost three decades in public office as an advocate of our environment. However, I think that excessive and unnecessary regulatory burdens can cause substantial harm by limiting economic growth, by slowing job growth, as well as by hindering America's ability to compete in the global marketplace and the global economy. And as I have said many times, I think our standard needs to be what is reasonable.

So I am eager to have a dialog about how best to improve the Federal regulatory process for the benefit of all Americans. In particular, I am hopeful that this hearing this morning will present us with suggestions that will help Congress address the flaws of our regulatory system. I am extremely troubled by the number of regulations that could have an impact on our ability to remain competitive with our key trading partners. Streamlining the regulatory process to limit unnecessary regulatory burdens on the American public is a very powerful force for reinvigorating our economy, small businesses, and our competitiveness on the international stage.

So I do look forward to the testimony of all of our witnesses here today. I would like to recognize now Mr. Lynch for his opening statement.

[The prepared statement of Hon. Candice S. Miller follows:]

Statement of Chairman Candice S. Miller
Chairman
Subcommittee on Regulatory Affairs
Committee on Government Reform
Washington, DC
July 27, 2005

Good morning, ladies and gentlemen.

America is at a cross roads. We can continue down a path that weakens our international competitiveness or we can recognize our responsibility for reducing the cost of doing business in the United States. America should be the best place in the world to manufacture products and create jobs and we are here today to discuss options for reforming our regulatory process. This hearing provides us with an opportunity to evaluate existing initiatives, consider new proposals, and develop a regulatory reform agenda for the 109th Congress.

I want to first say how glad I am to have my colleagues Representatives Sue Kelly, Bob Ney, and J.D. Hayworth with us today. These are three Members of Congress who really understand this issue and know how critical it is to improving our nation. Thank you all for being here today. I am also pleased to mention that my subcommittee colleague, Representative Ginny Brown-Waite, has proposed her own piece of legislation to address the issue of regulatory burden on the American public.

Regulation is one of the tools used by the government to implement public policy. They are necessary because laws may lack the details required to address the various circumstances they were designed to correct. Every year, over 60 federal departments, agencies, and commissions dedicate over 240,000 full-time employees to write and enforce regulations that range from allowing fireworks displays over rivers to registering food facilities to protect from bioterrorism. Combined, these agencies annually issue thousands of new rules and their costs for regulatory operations during fiscal year 2004 exceeded $39 billion.

According to one estimate, the total regulatory burden on the American public exceeded $850 billion per year—almost the equivalent of the amount paid in income taxes. Government regulations cost American small businesses 60 percent more per employee than the cost incurred by larger businesses. For every dollar devoted by the federal government to regulatory activity, American businesses spend $45 to comply with these regulations. At $8,000 per employee, domestic manufacturers assume almost twice the average cost for all U.S. industries. Workplace regulations alone cost manufacturers $2.2 million per firm per year, roughly $1,700 per employee. Our global competitors do not have this large of a burden, so it is no wonder that our nation continues to bleed jobs to competing nations.

During the past 50 to 60 years, Congress and various Presidents have developed procedures to guide the federal rulemaking process with the goal of reducing the amount of regulatory burden

imposed on the American public and businesses. Those in favor of regulatory reform argue that federal regulations are too costly, time consuming, complex, duplicative, burdensome and intrusive for businesses and other regulated entities. However, there are those who would argue that regulatory reform efforts focus too much on the costs of regulations and do not focus on the benefits.

Make no mistake, I am a defender of regulations that protect the environment, worker health and safety. I am a defender of regulations that watch over consumers and safeguard our natural resources. I have spent almost 3 decades in public office as an advocate of our environment. However, excessive and unnecessary regulatory burdens can cause substantial harm by limiting economic growth, slowing job growth, and hindering America's ability to compete in a global economy. As I have said many times – the standard must be what is reasonable.

I am eager to have a dialogue about how best to improve the federal regulatory process for the benefit of all Americans. In particular, I am hopeful that this hearing will present us with suggestions that will help Congress address the flaws with our regulatory system. I am extremely troubled by the number of regulations that could have an impact on our ability to remain competitive with our key trading partners. Streamlining the regulatory process to limit unnecessary regulatory burdens on the American public is a powerful force for reinvigorating our economy, small businesses, and our competitiveness on the international stage.

I look forward to the testimony of all of our witnesses today. I'll now recognize Mr. Lynch for his opening statement.

Mr. LYNCH. Thank you, Madam Chair. First of all, I want to welcome my colleagues who are here with us this morning to offer their proposals to reform the regulatory process; Chairwoman Kelly, who I serve with in the Financial Services Committee, along with Chairman Ney, and my pal Representative J.D. Hayworth, and we are also going to hear from a very energetic member of this subcommittee, Ms. Brown-Waite, with her proposal as well. We do appreciate your taking the time to come here today and also to spend your energies on a good cause. I think we can all agree there is a general consensus that we can do a lot more to improve the regulatory process; no question about it.

While I embrace the notion that we can do much more to improve the process, I believe a lot can also be said for using some of the tools that we have right now at our disposal to cause agencies to follow the spirit and the letter of the laws that we pass, to act consistently with legislative intent, and also to follow the constitutional protocols that we dictate in that legislation. We have seen departures from that on many occasions.

I believe that Congress already has the constitutional authority to oversee these agencies and to guide them. For example, last month it was revealed that the EPA plans to issue a draft rule, which would allow pesticides to be tested on humans. Since 2001 when the Administration reversed EPA's moratorium on using human pesticide experiments, EPA's position on this issue has been the subject of some controversy. Now, EPA plans to issue a proposed rule that fails to include necessary safeguards. For example, EPA's rule would not fully protect children and other vulnerable populations.

However, the Energy and Commerce Committee, with its full schedule, has not been able to have a hearing on EPA's proposed rule allowing the testing of pesticides on humans. On the other hand, we did find time in the Congress in previous sessions to, for example, spend 104 hours of congressional hearing time on examining whether or not President Clinton had abused his Christmas card privileges. So sometimes our oversight time is not well-spent.

Congress, and this committee in particular, will have an opportunity to investigate important examples of regulatory abuse and to help guide those regulatory agencies. We should also look at the pattern in which regulated industries have had an inappropriate influence on the EPA and other agencies' rulemaking activities. We are seeing, for example, significant delays in agency rules that are required by statute. A major cause of this delay appears to be OMB's failure to review agency rules in a timely manner.

To the administration's credit, the Bush administration has favored a rule implementing the Clean Air Act standards for fine particulate matter. I think most Members of Congress, Democrat and Republican, have said that this rule is favorable and has an important and positive health benefit. EPA sent that proposal to OMB formally in October 2004, but OMB still has not released the rule. This is an example where even when we have consensus among Democrats and Republicans, we have inactivity by OMB.

Congress has a Constitutional responsibility to conduct oversight of Federal agencies. In addition to a standing committee with jurisdiction on certain laws, the Committee on Government Reform has

a responsibility of overseeing whether agency laws, programs, and rules are being implemented and carried out according to legislative intent. Hopefully, now this newly constituted subcommittee under the guidance of Chairwoman Miller can make us all more effective toward that end.

Again, my thanks to my colleagues and all the witnesses testifying here today. We welcome you and look forward to your testimony. Thank you, Madam Chair.

Ms. MILLER. Thank you very much. Are there any other opening statements?

Mr. WESTMORELAND. I would like to make one, thank you.

Ms. MILLER. I recognize Mr. Westmoreland.

Mr. WESTMORELAND. Thank you, Madam Chairman. I am grateful that we are having this hearing and I appreciate my colleagues coming to testify.

One of the reasons that first motivated me to get involved in politics, being in the building business, was all the government regulations that myself and my industry face. Many businesses today spend so much time and money complying with regulations that they are unable to focus on their core business. And we not only have to deal with impact on businesses themselves, but also on the oversight necessary to enforce these regulations. Many times we were put under regulations to file papers that were just put in storerooms and never looked at, only to later be used as evidence against us for not complying or complying wrongly with the regulations that we were under.

One study placed the number of full time Federal employees necessary to write and enforce Federal regulations at 240,000. This is just unthinkable that the number would be this high, especially when so few of the individuals who write the regulations, as honorable as their intentions surely are, have no real world experience in the areas that they regulate.

I look forward to us evaluating various proposals before the committee today, and I am especially interested in legislation that gets a real cost-benefit analysis done for the impact of regulations on businesses across our Nation. Again, thank you, Madam Chairman, for having the hearing.

[The prepared statement of Hon. Lynn A. Westmoreland follows:]

Opening Statement of Rep. Lynn Westmoreland (GA-08)

before the

Subcommittee on Regulatory Reform

**Hearing on "Regulatory Reform:
Are Regulations Hindering Our Competitiveness?"**

Wednesday, July 27, 2005

Madame Chairman, I am grateful we are having a hearing to address an issue as important as evaluating the impact of government regulations on our competitiveness, and that these members of Congress and others have been willing to come testify about legislation to help rectify the serious problems we face.

One of the reasons that first motivated me to run for office in the state legislature was the number of regulations my building business had to address every day. Many businesses today spend so much time and money complying with regulations that they are unable to focus on their core business.

And we not only have to deal with the impact on businesses themselves, but also on the oversight necessary to enforce those regulations. One study placed the number of full-time federal employees necessary to write and enforce federal regulations at 240,000. This is just unthinkable that the number would be this high, especially when so few of the individuals who write the regulations, as honorable as their intentions surely are, have no real world experience in the areas they regulate.

I look forward to us evaluating various proposals before the committee today, and am especially interested in the legislation that gets a real cost-benefit analysis done for the impact of regulations on businesses across our nation.

Thank you, Madam Chairman, and I look forward to hearing from our witnesses.

Ms. MILLER. Thank you.

To our witnesses, the Government Reform Committee insists that we swear in all of our witnesses, even Members of Congress. So if you will all rise, please, I will swear you in.

[Witnesses sworn.]

Ms. MILLER. Our first witness that the subcommittee is going to hear from is my distinguished colleague, Representative J.D. Hayworth from the Fifth Congressional District of Arizona. Congressman Hayworth, in his fifth term, has become a leading advocate certainly on regulatory reform. He has sponsored the Congressional Responsibility Act, which improves accountability in the legislative process. J.D. is also a member of the House Ways and Means Committee and also serves on the House Resources Committee. Congressman Hayworth, we welcome you to our committee hearing this morning and look forward to your testimony, sir.

STATEMENTS OF HON. J.D. HAYWORTH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ARIZONA; HON. SUE W. KELLY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK; AND HON. ROBERT W. NEY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OHIO

STATEMENT OF HON. J.D. HAYWORTH

Mr. HAYWORTH. Madam Chair, thank you very much. I would ask unanimous consent that my complete statement be made part of the record.

Ms. MILLER. Without objection.

Mr. HAYWORTH. At the conclusion of the testimony, Madam Chair, unfortunately, given the vagaries of the schedule and the challenges of time, I will have to depart. But I do look forward to reviewing all that transpires in today's hearing.

Madam Chair, members of the subcommittee, and distinguished guests, thank you for affording me this opportunity to discuss one of the most fundamental reforms that this Congress can undertake: ending the unconstitutional delegation of legislative powers.

As was mentioned in opening statements on both sides of the aisle, reducing regulatory red tape will increase the ability of American businesses to compete in the world market. Unfortunately, government regulation and bureaucracy are significant impediments to the success of every business.

For too long Congress has ceded its lawmaking authority to unaccountable, unelected employees in the executive branch. Not only does this contradict the Constitution's "separation of powers" by making the executive branch the maker and enforcer of law, but it violates Article 1, Section 1 of our Constitution which states quite clearly: "All legislative powers herein granted shall be vested in a Congress of the United States." My testimony focuses on the unconstitutionality of delegation and why it makes for bad government.

My testimony focuses on H.R. 931, the Congressional Responsibility Act. As my colleagues would note, and as that wonderful baseball star Yogi Berra would say, "it is deja vu all over again." We have been steadfast in our insistence on trying to reign in this unconstitutional and unintended delegation.

I believe our Founders understood the negative implications of delegation of power. For this reason, our Founders defined the various roles of the three branches of government and emphasized their separations of power.

For the first 150 years of our existence as a republic, the Supreme Court held that the transfer of legislative powers to another branch of government was unconstitutional. But in the late 1930's, the Court reversed itself and upheld laws by which Congress merely instructed agencies to make decisions that served "the public interest." Since then, we in Congress have ceded basic legislative responsibility to executive agencies that craft and enforce regulations with the full force of law.

The Supreme Court has not invalidated a single delegation of power since 1935. Lawmaking was never intended to be in the hands of executive branch employees. As the Constitution enumerates, the power to make laws was solely vested in Congress because Congress is directly accountable to the people.

Delegation gives life to bad laws because it allows legislators to craft ambiguous legislation, legislation for which legislators can take credit without taking responsibility for the legal consequences or their costs. Congress can reap the benefits of delegation and its excesses by helping constituents through the complexities of Federal regulations at the same time those of us in public office can blame bureaucrats for misinterpreting our intentions in legislation.

So for purposes of full disclosure, regardless of political party or philosophy, the legislator basically can play both sides against each other and win. But the real loser in all of this is the electorate, the American people.

H.R. 931 will rightly return legislative powers to the Congress by requiring Congress to vote on all rules and regulations, as defined in Section 551, Subchapter 4 of Title 5 of the United States Code, except those regulations of particular applicability, any interpretive rule, general statement of policy, or any regulation of agency organization, personnel, procedure, or practice. My legislation will apply only to new regulations and will not be retroactive.

Detractors say there is no way Congress has the time to review all rules and regulations that are promulgated by the executive branch. But regardless of the time it takes, I would maintain it is the duty of Congress to review rules and regulations, as enumerated in Article 1, Section 1 of the Constitution.

Moreover, I have had the honor to serve as Speaker Pro Temp of the House of Representatives and, on more than one occasion, I have presided over a largely ceremonial debate in which we took several hours to name Federal installations after noteworthy Americans. My colleagues, I ask you, if we can name courthouses, airports, military bases, and other places, do we not have enough time to vote on rules and regulations that profoundly affect the citizens of this country?

With these time constraints in mind, however, the Congressional Responsibility Act provides an expedited procedure for considering rules and regulations. Within 3 days after an agency promulgates a rule, the Majority Leaders of both the House and Senate, by request, must introduce a bill comprised of the text of the legislation. If the bill is not introduced in 3 days, any Member thereafter may

introduce the bill. The bill is not referred to a committee unless a majority of Members agree to send it through the normal legislative process.

Within 60 days of being introduced, however, the legislation must come before the respective chamber for a vote. The bill shall be limited to 1 hour of debate and cannot be amended. If a majority of Members of the body vote for the bill, it is sent to the other body for approval. And upon approval of both bodies, the legislation is sent to the President to sign or to veto.

Other opponents of this legislation argue that this would delay the implementation of rules and regulations. But in reality, I suggest that it would not. Rules and regulations are often the subject of countless and seemingly endless lawsuits. For example, the final rule for unleaded gasoline took nearly 10 years to promulgate because it was the focus of intense litigation. Congress becomes the final arbiter in rulemaking and the Congressional Responsibility Act states that a regulation contained in the bill is not an agency action for the purpose of judicial review under Chapter 7, Title 5 of the United States Code. This would bring to a halt litigation that delays implementation of regulations.

Finally, opponents of this legislation will say this is a backhanded attempt at regulatory reform or ripping the entire notion of regulation out of government. No, no, no. Our Founders were right, the Constitution makes it clear all legislative powers shall be vested in Congress. Article 1 asserts that this legislative power includes the power to regulate. By returning the power to regulate to Congress, we make Congress accountable to the people for Federal laws. This will make for a better government, a laudable goal that we as well as the American people desire.

Ladies and gentlemen, this has a broad coalition of support. In fact, even Nadine Strossen of the ACLU, we got together about 10 years ago, said, "I cannot exactly go with you on this but I agree with the sentiment of the bill," and conservatives such as Judge Robert Bork, and, interestingly enough, it was now Justice Stephen Breyer who wrote in 1984 how the legislative veto should be replaced by an expedited procedure for Congress to pass rules and regulations.

Let me end by quoting John Locke's admonition that "the legislative cannot transfer power of making laws to any other hands." Delegation without representation is as wrong today as taxation without representation was in the 1700's. It is time Congress took back its Constitutionally granted powers to make law.

Madam Chairwoman, members of the subcommittee, thank you so much for your time and your attention.

[The prepared statement of Hon. J.D. Hayworth follows:]

Testimony of Congressman J.D. Hayworth Before the Regulatory Affairs Subcommittee on July 27, 2005

Madame Chairwoman, members of the subcommittee, and distinguished guests, thank you for affording me this opportunity to discuss one of the most fundamental reforms this Congress can undertake: ending the unconstitutional delegation of legislative powers.

Reducing regulatory red tape will increase American businesses' ability to compete in the world market. Unfortunately, government regulation and bureaucracy are significant impediments to the success of every business.

For too long, Congress has ceded its law-making authority to unaccountable, un-elected employees in the executive branch. Not only does this contradict the Constitution's "separation of powers" by making the executive branch the maker and enforcer of law, but it violates Article I, Section 1 of the Constitution, which states that, "All legislative powers herein granted shall be vested in a Congress of the United States." My testimony will focus on the unconstitutionality of delegation and why it makes for bad government.

My testimony today focuses on H.R. 931, the Congressional Responsibility Act, legislation I first introduced on December 6, 1995. I believe it is a long-term solution to our regulatory problem.

I believe our Founders understood the negative implications of the delegation of power. For this reason, the Founders defined the various roles of the three branches of government and emphasized their "separation of power."

For the first 150 years of our republic, the Supreme Court held that the transfer of legislative powers to another branch of government was unconstitutional. In the late 1930s, however, the Court reversed itself, and upheld laws by which Congress merely instructed agencies to make decisions that served "the public interest." Since then, Congress has ceded its basic legislative responsibility to executive agencies that craft and enforce regulations with the full force of law. The Supreme Court has not invalidated a single delegation of power since 1935. Unfortunately, law-making was never intended to be in the hands of executive branch employees. As the Constitution enumerates, the power to make laws was solely vested in Congress, because Congress is directly accountable to the people.

Today, evidence abounds that Congress has slipped from its constitutional moorings. The American with Disabilities Act tells employers to make "reasonable accommodation" of handicapped workers unless there is an " undue hardship," but leaves it to the Department of Justice to determine what is reasonable and required.

Similarly, the Occupational Safety and Health Administration (OSHA) calls for workplace standards that are "reasonable, necessary or appropriate to provide sage and healthful employment" but allows the Secretary of Labor to decide what that means. The Clean Water Act mandates the protection of "navigable rivers" and permits the Army Corp of Engineers and the Environmental Protection Agency (EPA) to exercise control over any land that has certain minimum water content. By law, commercial banks can only affiliate if they are "well capitalized," a vague determination made by the Federal Reserve Board and the Federal Deposit Insurance Corporation (FDIC).

Thus, delegation gives life to bad laws because it allows legislators to make ambiguous laws for which they can take credit without taking responsibility for their legal consequences or their costs. Congress can reap the benefits of delegation and its excesses by helping constituents through the complexities of federal regulations. At the same time, it can blame bureaucrats for misinterpreting its intentions. The legislator can play both sides and win. Unfortunately, the loser in all of this is the electorate.

With delegation, we also sacrifice accountability in government. Originally designed to be the most accountable branch of government, Congress has grown increasingly irresponsible. The fundamental link between voter and lawmaker has been severed by un-elected regulators hiding behind bad laws. A handful of broadly written laws have spawned an alphabet soup of government agencies and an overwhelming regulatory burden that undermine the very idea of representative government. Many regulatory analysts believe more consequential law is generated in the executive branch than in the legislative branch. Even the *Federal Register*, which churned out 4,167 rules and regulations in 2002, admits that Congress has ceded much of its law-making ability to the executive branch. In the explanation of the *Federal Register's* purpose, it states that it "provides a uniform system for making available to the public regulations...having legal effect."

When you consider that Congress passed and the President signed into law only 269 bills in 2002, agency rulemaking stands out as a significant problem. Bureaucrats are outpacing Congress over 15 to 1 in approving new rules.

Further, delegation allows powerful special interests to expend substantial resources in private to benefit the few at the expense of many. Simply put, if we are to restore integrity, responsibility, and confidence to the federal government, one of the best ways we can do this is by ending the unconstitutional delegation of legislative powers to the executive branch.

The Founders knew that law-making authority vested in Congress would make for good government because our elected officials would be directly accountable to their constituents. I often ask my constituents: Do you believe unaccountable employees in the executive branch should have the power to make laws? To this day, I have not heard one person answer this question in the affirmative. My constituents understand the ramifications of granting broad powers to the executive branch to make laws. Yet, to the

chagrin of most of my constituents, this is the case in America today. It is no wonder why my constituents, and the American people, are so disillusioned with government.

H.R. 931 will rightly return legislative powers to the Congress by requiring Congress to vote on all rules and regulations, as defined in section 551(4) of title 5, United States code, except those regulations of particular applicability, any interpretive rule, general statement of policy, or any regulation of agency organization, personnel, procedure, or practice. My legislation will apply only to new regulations and will not be retroactive.

Detractors will say that there is no way that Congress has the time to review all rules and regulations that are promulgated by the executive branch. Regardless of the time it takes, it is Congress's duty to review rules and regulations, as enumerated in Article I, Section 1 of the Constitution. Moreover, I have had the honor and privilege of serving as Speaker Pro Tempore. On more than one occasion, I have presided over largely ceremonial debate in which we took several hours to name federal installations after famous Americans. I ask you: If we can name courthouses, airports, military bases, and other places, don't we have enough time to vote on rules and regulations that profoundly affect the citizens of this country?

With these time constraints in mind, however, the Congressional Responsibility Act provides an expedited procedure for considering rules and regulations. Within three days after an agency promulgates a rule, the Majority Leader of both the House and Senate (by request) must introduce a bill comprised of the text of the regulation. If the bill is not introduced in three days, any Member thereafter may introduce the bill. The bill is not referred to a committee unless a majority of Members agree to send it through the normal legislative process. Within 60 days of being introduced, however, the legislation must come before the respective chamber for a vote. The bill shall be limited to one hour of debate and cannot be amended. If a majority of members of the body vote for the bill, it is sent to the other body for approval. Upon approval of both bodies, the legislation is sent to the President to sign or veto.

Other opponents of this legislation might argue that this would delay the implementation of rules and regulations. In reality, though, it would not. Rules and regulations are often the subject of countless and endless lawsuits. For example, the final rule for leaded gasoline took nearly 10 years to promulgate because it was the focus of intense litigation. Congress becomes the final arbiter in rule making and the Congressional Responsibility Act states that a regulation contained in a bill is not an agency action for the purpose of judicial review under chapter 7 of title 5, United States Code. This would bring to a halt litigation that delays implementation of regulations.

Finally, opponents of delegation will say that this is a backhanded attempt at regulatory reform. The Constitutions makes clear that all legislative powers shall be vested in Congress. Article I asserts that this legislative power includes the power to regulate. By returning the power to regulate to Congress, we will make Congress accountable to the people for federal laws. This will make for better government a laudable goal that we, as well as the American people, desire.

In my opinion, delegation is one of the root causes of the American people's disenchantment with government. We can take a step in the right direction by ending the unconstitutional delegation of powers. By taking this step, we will help restore confidence and integrity to the federal government. Many people agree with this analysis, and that is why the concept of non-delegation is embraced by both liberals, such as Nadine Strossen of the American Civil Liberties Union (ACLU), and conservatives, such as Judge Robert Bork. In fact, it was now-Justice Stephen Breyer who wrote in 1984 how the legislative veto should be replaced by an expedited procedure for Congress to pass rules and regulations.

I want to end my testimony by quoting John Locke's admonition that "the legislative cannot transfer power of making the laws to any other hands." Delegation without representation is as wrong today as taxation without representation was in the 1700s. It is time Congress took back its constitutionally granted power to make laws.

Again, I want to thank you Madame Chairwoman, as well as the subcommittee members, for allowing me to have this opportunity to testify here today. This Congress has talked a lot about reform. I think that ending the delegation of powers from the legislative to the executive branch could be the most important reform this Congress addresses. I am hopeful that we can make a substantial change to this glaring problem in the next year.

Ms. MILLER. Thank you very much. We certainly do appreciate your time here today and your introduction of H.R. 931 and your explanation as well. I recognize that you have other scheduling pressing matters, so we certainly excuse you. Thank you very much.

Mr. HAYWORTH. Thank you, Madam Chair.

Ms. MILLER. Our next witness is another one of my distinguished colleagues, Representative Sue Kelly from the 19th Congressional District of the State of New York. Congresswoman Kelly is in her sixth term. She has certainly been an advocate for many, many years of small businesses and small business owners and their employees.

She was the chief author of the Truth in Regulating Act of 2000 that created a new way of assessing the impact of new Federal regulations. Representative Kelly has introduced a bill now amending the Truth in Regulating Act that enhances congressional responsibility for regulatory decisions developed under the laws enacted by Congress.

We welcome you to our hearing today and look forward to your testimony.

STATEMENT OF HON. SUE W. KELLY

Mrs. KELLY. Thank you very much, Madam Chairwoman. It is a pleasure to be here. I appreciate your interest in this.

My bill, H.R. 1167, the Cut Unnecessary Regulatory Burden for Small Business [CURB] Act, demands that GAO, at the request of a subcommittee or full committee chairman in Congress, evaluate any promulgated rules and regulations that would have an annual effect on the economy of more than $100 million. This bill gives Congress proper oversight because a request by Congress would require the GAO to do a cost-benefit analysis as well as something that is equally important—looking at these rules and regulations for redundancy and overlap.

Congress, through the GAO, would have the knowledge of and the ability to fully evaluate unfair costs or impacts on small businesses before the new rules are implemented. Most importantly, GAO's analysis would allow Congress to submit more informed and more influential comments on the cost, scope, and content of proposed rules during the public comment period, and to hold hearings on these rules and regulations, if necessary.

Since the 104th Congress, I have led the fight for a Congressional Office of Regulatory Analysis. As you may know, those efforts resulted in the passage of something called the Truth in Regulating Act of 2000. President Clinton signed it into law. TIRA authorized a 3-year pilot project adding a function at the GAO to respond to congressional requests and provide for such congressional oversight. It now has sunsetted.

Last Congress, the House passed the Paperwork and Regulatory Improvements Act, which contained a similar provision that would have made permanent this pilot program. That bill never passed the Senate.

Thus, I have introduced the CURB Act, which tries again to make permanent the TIRA bill that was passed in 2000 and to fund that bill.

The oversight mechanism in H.R. 1167 is tailored to specifically protect small businesses from burdensome and duplicative regulations. In New York's Hudson Valley, where I represent the small business owners, they have reiterated to me time and time again that their paperwork is unreasonable, they feel the government regulations are redundant, and the most severe problem they face almost every day is trying to figure out how to fill out these forms. They are begging for relief, and I do not think this is any surprise. The burden of regulatory compliance on small businesses is so much. Most people do not realize it is as much as 50 percent more than for larger companies.

The increased workload and the time commitment is not the only concern. Cost is also an issue. Troublesome and duplicative regulations cost the average small business in this Nation almost $7,000 per employee per year. Rather than using this money to hire new employees, as well as create and enhance customer relations, small businesses are forced to lose this money by complying with excessive regulation.

Passage of H.R. 1167 is important for small businesses across the Nation. They are the primary engine of our economic growth in our communities. We cannot go without the 7 out of 10 new jobs created each year by small businesses. If you stop and think about it, by reducing the regulatory burden, there could even be more jobs created by our small businesses.

This legislation is trying to help solve the dilemma of overly burdensome regulatory schemes in a number of ways. The CURB for Small Business Act improves the transparency of the decisions at the Federal agencies. In doing so, it enhances the efficiency in the way regulations are designed and implemented. It leads to competent, economical use of our government resources, and most importantly, provides sensible rules for small business that have to comply.

The act promotes valuable congressional oversight. Because Congress provides the authority for the administrative agencies to create the regulations, it makes sense that Congress should retain some of the ability to make certain the regulations do not create waste in government, or worse, redundant and unnecessary rules for small businesses.

The bill also increases the accountability of Congress. This is one method of assuring that not only are Federal administrative agencies doing their job, but it also encourages Congress to keep up with its obligation in providing the authority to the agencies. Agency personnel are not elected, as my colleague pointed out. Because we in Congress are, we have to answer to our small business owners, and they are begging us for relief.

The CURB for Small Business Act is a positive step in helping small businesses and keeping regulations fair. In Congress, we should have the oversight over the thousands of rules and regulations established by government agencies. The last time I looked, government agencies were promulgating rules and regulations at the rate of about 4,000 rules and regulations a year. There is definitely redundancy, there is definitely overlap, and no one has the authority at the present moment to do a cost-benefit analysis of

these rules and regulations with regard to what their effect is on small business.

We have to help our small businesses. This piece of legislation I am offering does just exactly that.

Thank you very much for allowing me to testify in front of the committee today. I appreciate your concern, I appreciate your interest, and I look forward to your support on this bill.

[The prepared statement of Hon. Sue Kelly follows:]

Statement of the Honorable Sue W. Kelly
H.R. 1167
Wednesday, July 27, 2005

Thank you, Madam Chairman.

HR 1167 – The Cut Unnecessary Regulatory Burden (CURB) for Small Business Act demands that the GAO, at the request of a subcommittee or full committee chairman in Congress, evaluate any promulgated rules and regulations that would have an annual effect on the economy of $100 million or more.

This mechanism gives Congress proper oversight because a request by Congress would require the GAO to do a cost/benefit analysis, as well as evaluate the presence of redundancy and overlap in the rules and regulations.

Congress, through the GAO, would have knowledge of and the ability to fully evaluate unfair costs or impacts on small businesses before new rules are implemented.

Most importantly, GAO's analysis would allow Congress to submit more informed and more influential comments on the cost, scope and content of proposed rules during the public comment period, and hold hearings if necessary.

Since the 104th Congress, I have led the fight for a Congressional Office of Regulatory Analysis (CORA). As you may know, those efforts resulted in the passage of the Truth In Regulating Act of 2000 (TIRA). President Clinton signed it into law.

TIRA authorized a 3-year pilot project adding a function at the GAO to respond to Congressional requests and provide for such Congressional oversight. It has now sunsetted.

Last Congress, the House passed the Paperwork and Regulatory Improvements Act of 2004, which contained a similar provision that would have made permanent this pilot program. That bill did not pass the Senate.

Thus, I have introduced The CURB for Small Business Act, which again works to make permanent the TIRA bill passed in 2000.

The oversight mechanism in HR 1167 is tailored to specifically protect small businesses from burdensome and duplicative regulations.

In New York's Hudson Valley, where small business owners have reiterated that unnecessary paperwork and unreasonable government regulations are the most severe problem they face every day. The small businesses are begging for relief.

And, this is no surprise. The burden of regulatory compliance on small businesses is as much as 50 percent more than for larger companies.

The increased workload and time commitment is not the only concern. Cost is also an issue. Troublesome and duplicative regulations costs the average small business almost $7,000 dollars per employee each year.

Rather than using this money to hire new employees, as well as create and enhance customer relations – small businesses are forced to lose money in complying with excessive regulations.

Passage of HR 1167 is important for small businesses across the entire nation.

Small businesses are the primary engine of economic growth in our communities. We cannot go without the 7 out of 10 new jobs created each year by small businesses.

This legislation helps solve the dilemma of overly burdensome regulatory schemes in a number of ways.

- The CURB for Small Business Act improves the transparency of decisions at our federal agencies. Doing so enhances the efficiency in the way regulations are designed and implemented. This leads to competent, economical use of government resources, and most importantly provides sensible rules for the small businesses that must comply.

- The Act promotes valuable Congressional oversight. Because Congress provides authority for the administrative agencies to create regulations, it makes sense that the Congress should retain some ability to make certain those regulations do not create waste in government, or worse, redundant and unnecessary rules for small businesses.

- The bill also increases the accountability of Congress. This is one method of assuring that not only are federal administrative agencies doing their job, but also that Congress is keeping up with its obligation in providing the authority to the agencies. Agency personnel is not elected. Because Congress is, we must answer to our small business owners and they are asking for relief.

The CURB for Small Business Act is a positive step in helping small businesses and keeping regulations fair. As elected Members of Congress, we should have oversight over the thousands of rules and regulations established by government agencies.

This piece of legislation does just that.

Thank you for allowing me to testify in front of the committee today and I look forward to the committee's support.

Ms. MILLER. Thank you very much. We certainly appreciate that testimony.

The subcommittee will hear from another one of our distinguished colleagues, and this is Representative Bob Ney from the 18th Congressional District of Ohio. Congressman Ney is serving his fifth term in Congress. He is also the chairman of the House Administrative Committee of which I am proud to serve alongside of him; we fondly refer to him as the Mayor of Capitol Hill. He is also an advocate for reform of the Federal regulatory system. He has introduced the Joint Committee on Agency Rule Review Act, which would provide for greater congressional accountability in the regulatory process.

We want to thank you for being here at our hearing today, and we look forward to hearing your testimony.

STATEMENT OF HON. ROBERT W. NEY

Mr. NEY. Thank you, Madam Chairman, and we appreciate your service on House Administration. You are a new member and you have quickly brought a lot of good insight to the committee. And thank you Ranking Member Lynch and also the gentleman from Georgia, Congressman Westmoreland. I want to thank you for the opportunity to discuss this bill. I think it is important.

Congresswoman Kelly and Congressman Hayworth and I came at the same time 10 years ago to the Congress and this was talked about at that point in time, and I am going to mention in a minute, of course, the CRA, Congressional Review Act. But the bill I have is H.R. 576. Let me begin by discussing the current regulatory climate and how the Federal Government currently addresses new rules before proceeding on how this bill would improve these procedures and strengthen the congressional oversight.

In 2004, Congress passed, and the President signed, 299 bills that are now law. Over that same period of time in 2004, regulatory agencies issued 4,104 final rules versus our 299 bills. I personally find the difference between these numbers staggering. Unfortunately, they are not atypical of the current system. Recent reports show that 4,266 more regulations are presently in the different stages of development as we speak, and 135 of those 4,266 are economically significant rules which will have an impact of at least $100 million each.

In fact, the Office of Information and Regulatory Affairs at the White House estimates that regulations adopted over the last 10 years cost Americans between $34 billion and $38 billion annually. Some reports show the total impact of all Federal regulations to be ten times this amount each year. And it is not going to go down.

Quite honestly, these regulatory costs have substantial effect on our economy and the small businesses that drive it, and obviously, most importantly, for the workers of the United States. A recent World Bank study titled "Doing Business 2004: Understanding Regulation" shows that cumbersome regulations are associated with lower productivity, increased abuse, higher costs, and longer delays. It was stated by this very committee that the structural costs of American products compared with our foreign competitors is 22 percent higher due to Federal regulations.

I appreciate, by the way, the committee drawing attention to this matter. I think it is important to show that regulations increase costs to small business, and in a global economy these regulations affect competitiveness. At a time when we are fighting for our lives with China to eliminate unfair trading practices and open markets to U.S. products, it simply does not make sense to make our products less desirable by increasing the overhead costs to American small businesses and driving up the cost of their products.

Now not all regulations are bad, we know that. Nor do they all have a negative effect. I believe some regulations are warranted, meet the intent of Congress, and have a positive cost-benefit relationship. Now regulations should not be in the eye of the beholder, and that is where I will get to the point of what this does, which I think is fair to all the regulations.

But my concern is with our ability as an institution to review 4,000 rules a year. One thing I tell constituents back home is that you can question how a Member votes. You know, people watch C-Span and say why does this person vote that way, but one thing I think you cannot question of this body is the incredible amount of hours and tough schedule that everybody I think puts in around here. And, so how do we review 4,000 rules a year as a body?

Independent of Members' individual reviews on a specific regulation, the avenues available to Congress under the Congressional Review Act to address costly rules are limited and rarely utilized. In the 8 years since the CRA took effect, Federal agencies have submitted 34,000 rules to Congress. Of these rules, 535 were major rules having impact of at least $100 million. Over this period of time, approximately 30 Congressional Review Act joint resolutions of rule disapproval have been introduced, regarding more than 20 of these 34,000 rules, but only one rule was overturned through CRA's procedures.

This legislation, House Resolution 576, would address this problem by establishing a special joint committee between the House and the Senate that would be tasked with reviewing all regulations proposed by a Federal agency. This Joint Committee on Agency Rule Review, in Ohio we call it JCARR, would vote in disapproval of the regulation if it violates the intent of the law it is supposed to implement. Then a disapproval resolution under the Congressional Review Act would be introduced in each chamber with guidelines established for expedited consideration.

This process works in my State; I was on it. I think, Mr. Lynch, you were on a similar type of body in Massachusetts from 1994 to 1996. I do not know exactly how it works, and I am told the research shows that many other States have similar types of mechanisms.

This process works. My State of Ohio has had this since 1977, and this JCARR committee has played an important role in ensuring the accountability of State agencies while limiting the power of State bureaucrats.

Here is a brief example of how JCARR would work if enacted into law. In this scenario the EPA is proposing a regulation that could be harmful and threaten hundreds of jobs. Here is the step-by-step of how a review would work:

The EPA publishes a final regulation that is bad, we will call it Regulation A in this example. Under the law, Regulation A must be submitted to JCARR when it is published. JCARR, the House and Senate panel, which is 12 Members of the House, 12 of the Senate here, is then required to give the committees of jurisdiction copies of the proposed regulation.

Once the rule is submitted to JCARR, a 60 day clock runs where the committee has time to consider Regulation A. Days where either house is out of session, the House or the Senate, for more than 3 days does not count toward the 60 day clock.

Now if JCARR takes no action and the clock runs out, Regulation A takes effect. Simple as that. However, if JCARR votes to disapprove Regulation A—and I would note a lot of committee Chairs and Ranking Members would have input into JCARR, because that is one of the concerns, that you are taking away jurisdiction and you are really not. Most of the time we fight these rules or opinions through letters that are sent around.

If JCARR votes to disapprove Regulation A, a joint resolution of disapproval is reported to the Congress. If a majority of the House and Senate Members vote to disapprove, the resolution goes to both chambers; however, if a majority of just one chamber's Members vote in disapproval, the resolution is reported only in that chamber.

In the House, once the resolution is reported, the House has 3 days to bring the resolution to the floor, otherwise it is in order for any Member to make a privileged motion to consider it if the House does not do that. These are expedited procedures. In the Senate, most of the expedited procedures are already in place because of the Congressional Review Act. If the joint resolution goes to both houses and passes, it goes to the President for his signature.

If the President signs the resolution, Regulation A will have no effect and will not take effect. If the President vetoes it, Congress has 30 days to vote to override the veto if they want to try again to stop the regulation. If either chamber fails in a vote to override the veto, Regulation A takes effect immediately.

I have kind of simplified this process. But if enacted, JCARR would help to ensure that the regulations implementing laws passed by Congress adhere to the spirit of the legislation and are not detrimental to our Nation's economy. I hope you will be able to look at this. Let me just conclude, I want to thank one of our staff, Brian Petersen, for putting a tremendous amount of time in on this and who has worked with other staffs.

I just want to end with an example. Powhatan Point, OH, which now Congressman Strickland represents but I used to represent actually 24 years ago as State Representative and then in Congress for a while, they had a major flood down there. Powhatan is a poor community, like a lot of communities in Appalachia I represent.

There was a rule so that if the people took their trailers and moved them off the trailer court so they would not flood, when they wanted to bring them back FEMA said you can bring them back if you build concrete blocks and put the trailer on top of the concrete blocks, so they will be out of the way of the next flood. Of course, that means that you have to run pipes up there, build the concrete blocks and it is raised up there, and you would have to build a porch.

We tried with the Federal Government to say why not just let them do what they do every couple of years, put a hitch to the trailer and take it out of harm's way. I fought 10 years. I was finally successful last year in getting something in the flood insurance bill. Ten years.

If you look at some of these rules, again, they are not all bad, but I just think it has gotten so out of control. This is a process that will not take away Chairs' or Ranking Members' jurisdiction. But the bottom line of JCARR, why it has worked so well in Ohio, is the staff, trained professional staff, and pretty soon the agencies start to get used to the fact that they better think these rules out because they are going to run into a lot of interference if they do not. So I think this enhances the abilities of the Chairs and ranking members.

Thank you for your time.

[The prepared statement of Hon. Bob Ney follows:]

WRITTEN STATEMENT OF
Bob Ney
Member of Congress
BEFORE THE COMMITTEE ON GOVERNMENT REFORM'S
SUBCOMMITTEE ON
REGULATORY AFFAIRS
UNITED STATES HOUSE OF REPRESENTATIVES
HEARING ON
Congressional Regulatory Reform Initiatives
July 27, 2005

Madam Chairman, Ranking Member Lynch, and Members of the Subcommittee, thank you for the opportunity to discuss regulatory reform and my bill the Joint Committee on Agency Rule Review Act of 2005 (H.R. 576).

Let me begin by discussing the current regulatory climate and how the federal government currently addresses new rules before proceeding to how my bill would improve these procedures and strengthen Congressional oversight of rule development.

In 2004, Congress passed, and the President signed, 299 bills into law. Over this same period regulatory agencies issued 4,101 final rules. I personally find the differences between these numbers staggering.

Unfortunately, they are not atypical of the current system and recent reports show that 4,266 more regulations are presently in different stages of development; 135 of these are economically significant rules which will have an impact of at least $100 million each.

In fact, the Office of Information and Regulatory Affairs (OIRA) at the White House estimates regulations adopted over the last 10 years cost Americans between $34 billion and $38 billion annually. Some reports show the total impact of all federal regulations to be 10 times this amount each year.

Quite honestly, these regulatory costs have a substantial effect on our economy and the small businesses that drive it. A recent World Bank study titled "Doing Business 2004: Understanding Regulation" shows that cumbersome regulation is associated with lower productivity, increased abuse, higher costs and longer delays.

I believe it was this very committee which stated in an April 12, 2005 hearing that the compliance with governmental imposed regulations cost small businesses as much as $7,000 dollars per employee. It was also stated by this Committee that the structural cost of American products compared with our foreign competitors is 22% higher due to federal regulations.

I appreciate the Committee drawing attention to this matter because it is important to show that regulations increase costs to small business and in a global economy these

regulations affect competitiveness. At a time when we are fighting with China to eliminate unfair trading practices and open their markets to US products, it simply doesn't make sense to make our products less desirable by increasing the overhead costs of American small businesses and driving up the cost of their products.

Not all regulations are bad, nor do they all have a negative effect. I believe some regulations are warranted, meet the intent of Congress, and have a positive cost benefit relationship. My concern is with our ability, as an institution, to review 4,000 rules a year. Independent of Members' individual views on a specific regulation, the avenues available to Congress, under the Congressional Review Act (CRA), to address costly, egregious rules are limited and rarely utilized.

In the eight years since the CRA took effect, federal agencies have submitted nearly 34,000 rules to Congress. Of these rules, 535 were major rules having an impact of at least $100 million. Over this time period approximately 30 CRA joint resolutions of rule disproval have been introduced regarding more than 20 of these 34,000 rules, but only one rule has been overturned through CRA's procedures.

My legislation, H.R. 576, would address this problem by establishing a special Joint Committee between the House and Senate that would be tasked with reviewing all regulations proposed by a federal agency. This Joint Committee on Agency Rule Review (JCARR) would vote in disapproval of the regulation if it violates the intent of the law it is supposed to implement. Then a disapproval resolution under the Congressional Review Act would be introduced in each chamber with guidelines established for expedited consideration.

This process works: my State of Ohio has had a functioning JCARR since 1977 and this Committee has played an important role ensuring the accountability of state agencies while limiting the power of state bureaucrats.

Here is a brief example of how JCARR would work if enacted into law.

In this scenario the EPA is proposing a regulation that could be harmful to businesses and threaten hundreds of jobs. Here is the step-by-step of how a review would work.

1) EPA publishes a final regulation that is bad – we'll call it Reg A for this example.

2) Under the law, Reg A must be submitted to JCARR when it is published. JCARR is then required to give the Committees of jurisdiction copies of the proposed regulation.

3) Once the rule is submitted to JCARR, a 60-day clock runs where the Committee has time to consider Reg A. Days where either house is out of session for more than 3 days do not count towards the 60 day deadline.

4) If JCARR takes no action and the clock runs out, Reg A takes effect; however, if JCARR votes to disapprove of Reg A, a joint resolution of disapproval is reported to Congress. If a majority of House and Senate Members vote to disapprove, the resolution goes to both chambers; however, if just the majority of one chamber's members vote in disapproval, the resolution is reported to only that chamber.

5) In the House, once the joint resolution is reported, the House has 3 days to bring the resolution to the floor otherwise it is in order for ANY member to make a privileged motion to consider the joint resolution. (These expedited procedures are important since major rules automatically take effect if not rejected within 60 days of being reported to Congress.)

6) In the Senate most of the expedited procedures are already in place because of the Congressional Review Act. The joint resolution will be referred to the committee of jurisdiction, however after 20 days as few as 30 members can sign a petition to have it discharged and at that point any Senator can move to have the motion considered.

7) If the joint resolution goes to both houses and passes, then it goes to the president for his signature.

8) If the President signs the joint resolution, Reg A will have no effect.

9) If the President vetoes the joint resolution, Congress has 30 session days to vote on overriding the veto before Reg A can take effect.

10) If either chamber fails in a vote to override the veto, Reg A takes effect immediately.

If enacted, JCARR would help to ensure that the regulations implementing laws passed by Congress adhere to the spirit of the legislation and are not detrimental to our nation's economy. I hope that you will choose to support this legislation which I believe is vital to restoring a balance between the executive and legislative branches of our government.

Ms. MILLER. Thank you very much. I found your testimony really fascinating. In fact, when we thought about having this hearing we were sort of looking for some of the various innovative pieces of legislation that Members of Congress had introduced in regards to regulatory reform. We looked at yours, in particular, as sort of a best practices because you had experience with it in Ohio as well.

I was interested to note in your testimony, you mentioned about China. Here we are fighting with China. In one of our hearings previously we had invited my former Governor, John Engler, who is now the executive director of the National Manufacturers Association, in which he very interestingly talked about a study that NAM has done that shows the structural cost of all American goods are about 22–23 points higher than any of our foreign competitors principally because of regulatory burdens that we put on ourselves.

So as we are unfortunately bleeding manufacturing jobs to China or Mexico or whatever? Guess what: they did not put all these regulatory burdens on us, we have done this to ourselves.

That is why I say I think the standard has to be reasonable. And we look to the States very often, I think as incubators for some of the best practices that the Federal Government could implement as well. And as you talked about your bill, H.R. 576, could you flesh out perhaps a little bit, for us, some of the principal differences you might see in how the JCARR worked in the State of Ohio as opposed to an analogy of how you see your bill working here at the Federal level?

Mr. NEY. One nice thing about Ohio, and this could be adapted, parts of it could, we have Chapter 119 code, so the agencies have to go through some pretty set procedures. When they come to JCARR where you have six State Representatives and six State Senators all equally divided, this is totally bipartisan, you have 12 and 12, all equal division, and when they would bring a rule, if they had not followed all of the procedures or the public testimony, we could actually sit there and say why not take this rule back, take another look at it.

Most of the time the agencies would say fine. Every once in a while they would still proceed, and then we could make a motion to throw it to the floor within 3 days in the House and Senate. Now once we disapproved it, we did not need the signature of the Governor, which was, I think, good, because it has your balance between the executive and the legislative. We did not need the signature of the Governor. In this case, you need the signature of the President. I think that is one big difference probably.

When I first, 10 years ago, went to the leadership and other people, the committee Chairs said, this is taking away our authority. And like I said earlier, with the schedules, tell me how many times, and I Chair a committee and we oversee the Federal Elections Commission, how many rules, since you have been on the committee, have we sat and reviewed? We really do not. We will interact and have opinions, but we really do not review it.

So I view this House-Senate body as not usurping. And in Ohio, that is the way the psyche worked with this. In fact, we were happy to have JCARR because we could say, hey, I chair—at that time I chaired appropriations—and I could say to JCARR, why not

take a look at this, and the staff really worked with us and enhanced us. It was very bipartisan.

So I think the difference is here you still need the President to sign off. It puts a lot of pressure, I think, on the executive to have a little bit more responsibility. They are just churning out rules and regulations and we catch this or do not catch that. I also wanted to mention approaches—Congresswoman Kelly has an approach, J.D. Hayworth has an approach—I think there are a lot of good approaches out there, but I think you are seeing this start to bubble up because of the problems. So those are just a few differences in Ohio's JCARR, being that the main difference is the Governor is not involved.

Ms. MILLER. I appreciate that. Talking about paperwork, I have this question for you, Representative Kelly, because you mentioned about the paperwork burden that all your small businesses are complaining about.

Actually, the staff has heard me make this comment previously, but in light of the shuttle launch, my dad was an aeronautical engineer and worked with Wernher von Braun at Redstone and at the very early days of rocket science where they were shooting off rockets. He always said it was very exciting until the Federal Government got involved, at which time they said with all the paperwork that was required they would never shoot off a missile until the weight of the paperwork equalled the weight of the rocket.

And I think that is probably what happens now. But we also, under this subcommittee and our full committee, look at the Paperwork Reduction Act and it is something that is coming through as well.

Under your legislation, how would you see the Congressional Office of Regulatory Analysis [CORA], would they have a role in evaluating, reviewing the paperwork burden on small businesses?

Mrs. KELLY. CORA is not the actual bill that passed. TIRA is the bill that passed and was signed into law. Congressman Ney has a Cadillac, I have a sports car. And the reason I say that is, it is something that would set aside an office in the GAO. The GAO exists. They already have experts, and basically they would do the analysis and then report to Congress so that the analysis that would be done would not only be cost-benefit, but it would be redundancy and overlap.

If you run a small business, as I did and as my family does, you have constant interference from the Federal Government asking for forms to be filled out, for your employees, for any impact you may have if you have trucks, cars. There is just a huge number of forms you are constantly being asked for from the Federal Government.

It seems to me if you look at redundancy and overlap, which my bill does, we as Congresspeople are going to be able to go back to an agency and say, why are you asking in agriculture for something that commerce is asking for also, can we not combine these two requests into one request and let the small businesses comply with that electronically, and then let each agency go to the electronics that were filed.

In other words, it is a way of shrinking paperwork and shrinking a lot of what the Government is doing in terms of interfering with

the way that small businesses do business because of these constant demands with paperwork.

Ms. MILLER. Thank you very much. Representative Lynch.

Mr. LYNCH. Thank you, Madam Chair. Chairwoman Kelly, just to follow the procedure here, the bill that you did get passed, which was a sound one, the TIRA, was never funded. You proposed a 3-year pilot program, and it was never funded. Now we are sort of leapfrogging and this new bill is actually to make TIRA permanent without going through that 3 year pilot.

Would it not give us the benefit of looking at that program for 3 years if it were in fact funded? What I am asking is, I think your original idea was a good one, and I am just questioning why we are departing from that and instead trying to put this in permanently? Is it just frustration with the fact that they did not fund it to begin with?

Mrs. KELLY. I started this bill within 6 months of my freshman year in Congress. I have been in Congress 10½ years and I have been pushing this for a very long period of time. Before I leave Congress, I would like to actually do something to reduce paperwork and the burden of costs on small business. If we make TIRA permanent and we fund it, we have a built-in situation at the GAO where it can work and it could start work tomorrow.

I would like to see it go beyond just a pilot bill. I think now the pain that small businesses in this Nation suffer from all of this tremendous burden of paperwork, the enormous number of Federal regulations that are going after them day after day, it needs to be lifted, and it needs to be lifted on a permanent basis.

When you stop and think about the fact, if you have been a small business person, as I have, I have run a small business, I know that I did not have time to sit down and read the Federal Register, which is where most of this stuff is published. I never found out about most of the regulations that were hitting my business until somebody from the Federal Government came in and said, oh, by the way, you did not file form JHQ137. Well, I did not know I needed to file that because I was busy running my business. And, yes, I did file it.

But there is no reason why that should occur. That sort of thing should be restricted by us; we are elected by these people to represent them. It is our duty to try to help them do what they do best, which is generate jobs, shore up our economy. It seems to me that if we make this permanent and we fund it, we have done just that.

Mr. LYNCH. OK. My question was one around strategy and I think you have explained it.

Mr. Ney, first, I think you correctly recognize that there will be some concern around jurisdiction. I think the one benefit that we do have with committees of jurisdiction is that they deal with the substance of particular bills. In Financial Services, Sarbanes-Oxley, those folks lived with it for I do not know how long, and so they have this very profound understanding of the legislative intent and the workings of the bill.

And so I think, in the first instance, it is probably better to have them deal with a resolution for disapproval. But on the other hand, I do recognize—you know, the numbers that you cited—only 30 dis-

approval resolutions referred, only 1 successful on ergonomics, that may be the flaw in the CRA, the Congressional Review Act, is that it is everybody's job, but it is nobody's job; anybody can do it, but nobody has to do it.

And so that the model that you set up on the Ohio model makes it the responsibility of this committee. And maybe the value is in that, that we actually have somebody who we have named as gatekeeper for the regulatory process so that somebody has to look at it. And if they abdicate their responsibility to review it, so be it, but it is their responsibility.

So I think that has an attractiveness to it that there is accountability and responsibility delegated to a certain group in the process that we do not have right now. That is all I have.

Mr. NEY. Madam Chair.

Ms. MILLER. Yes.

Mr. NEY. I thank the gentleman for his comments. Actually, differences, there are a couple of things, and without objection, if I could submit this for the record.

Ms. MILLER. Without objection.

Mr. NEY. There are some things I did not mention, because there are some differences. There are 24 members here, 10 members in Ohio. But I would note something which is of interest and food for thought. The criteria for recommending disapproval or validating a rule in H.R. 576 is not stated in there. In Ohio, it is if it exceeds the rulemaking authority or if they did not follow the proper procedure and intent.

Ohio has an interesting part I did not put in this bill, which is, if the intent of the bill is there. You know, all of a sudden around here, somebody will say we wrote the bill, here we are, this was our intention, and over here it sort of does not matter to the agencies, it is well, that is fine, OK, go away and we will do what we want. Whereas in Ohio, intent could be a reason.

Now one other thing too, in this bill there is nothing short of disapproval. In Ohio, they can actually pick up the phone, see if they can resolve part of it, and it can also be partial, part of the rule can be dismantled if you want to.

So I just wanted to mention there were some differences. I also do not go retroactively back. This is forward. But in regards to what you said, I think that you have to watch the jurisdiction. But as chairman of a committee and knowing other committees, there is just so much that cannot be caught. So if you worked it the right way, I think it would be an enhancer to the committee process.

But you are right, you have that expertise within, like Sarbanes-Oxley, of debating, I think Section 418 or 404, I thought I would say that in my sleep, I thought I would never forget it, but debating what was the intent, what was done. So, yes, there are some levels of expertise in the committees.

But I think the staffs would also interact a lot with this staff. And I have to stress, too, as it was in Ohio, you picked up the phone, you interacted with the staff, they were all there for JCARR, and it kept any amount of partisan bickering down.

Ms. MILLER. Very well. Representative Westmoreland.

Mr. WESTMORELAND. Thank you. Mr. Ney, just to kind of finish up on what Mr. Lynch said. What my experience has been in the

past of rules being approved, we have environmental health districts in the State of Georgia and it is composed of the school superintendent, a registered nurse, a doctor, a mental health advocate, and so forth, and yet the septic tank regulations have to be approved by this group.

These people would not know a septic tank if they saw one. And so what happens is you may get a guy coming in and he can tell them anything, they think he is an expert in the situation, and so they say, yes, this rule sounds good when it really may go against the manufacturer's recommendation of even how to put in the system.

I think what Mr. Lynch said maybe about the committee of jurisdiction, because they have heard testimony, they have actually heard all the different reasons why or why not we should have the law that we are passing, they may have more insight into the rules or the regulations that were being written to make sure this law was being abided by more than maybe some elected officials that may depend on staff or whatever to do that.

Do you see that as a problem? I know that in Ohio this thing, evidently, was quite successful. I agree with what you are trying to do, but did you ever give any consideration to it being the committee of jurisdiction that would actually look at these things?

Mr. NEY. Yes, I thought about that because, again, when I first got out here I was just told this is mixing in everybody's business; no, the committees handle it. After a couple of years I looked around and we started asking staffers, you all can take your own experiences in how long you have been here, how many times did you actually have hearings on rules? I was stunned when Brian in our office did this research. I was stunned at that. I had no concept there had been that many and 4,600 in 2004. So, yes, we thought about it.

Actually, when JCARR is functioning here, it will go to the committees, it will be submitted, and they can do something if they want to. But a lot of committees are just absolutely too busy, and they cannot handle thousands of them. And as you just gave an example in your statement, I think it is the small ones, too, that escape us.

I am sure you all have been through this, you go home and somebody says what is wrong with you, why on Earth did you do this to us, or I am down at the local union and they will ask me a question, and I will say, I did not do that, and then you go back and you find out it was an agency that did it last year; we did not know.

I will give you one concrete example. I live in St. Clairsville, OH. When I was a State Senator, Natural Resources said you have to have composting because we do not want these grass clippings thrown all over the place. So they had composting, and we agreed with that; I think it was a good thing. Then they came back, and they announced that every town had to hire a compost manager and assistant compost manager.

My advice to the mayor is let everybody throw them all over the hill, because it is 4,000 people, and you are going to pay $40,000 for a compost manager. People agreed to do composting. So you can find those.

Now, a lot of people did not know that existed but because of the way JCARR worked, basically they called up ODNR and said, if you would like to continue down this path, we can tort you all day long with hearings because JCARR has the time to do it. The staff attorneys, the professional staff just keep at this all day with the bureaucracy. That is a true example. And ODNR got hold of itself and said, OK, we will rethink that. They are going way beyond even the scope of law or the intent of law.

But we thought about individual committee jurisdiction. It will still go there under this. I just think there is not enough time in the day.

Mr. WESTMORELAND. I appreciate what both of you are trying to do. I had a similar situation. I went home, and being in the building business, I had a gentleman that had a dual wheel truck and was pulled over by the State Patrol and given a ticket because he did not have his company name on the side of the truck and he had not had a physical, and also because of a homeland security issue on the size of trucks and the fact that you would have to have your name and phone number.

He does not advertise his business, but yet now he has a sign on his door that identifies his company with a phone number and he had to go pay $300 to get a physical to be able to get the driver's license to drive that size of truck. It is just really a normal truck, and how the State patrolman knew how much it weighed is beyond me, but it was part of that homeland security.

So there are consequences that we never think of that we do up here when we pass laws. And I want to commend both of your for your effort, and I hope I am on both of those bills.

Ms. MILLER. We certainly thank you both so very much for graciously sharing your time with us. All of us, I think, have various examples that we can cite. Back home, I have to tell you, my stump speech when I am out speaking to Rotaries or Kiwanis or whoever and I tell them I am subcommittee Chair of Regulatory Affairs now, and they say what is that, and you start talking about some of these different regulations.

The one I always cite is something that was told to us, and we will probably be hearing about it in this committee at some point in the future from the American Bakers Association, where you have a situation where the Federal Government has decided there is a molecule that is released when there is fresh baked bread with a beautiful aroma emanating, and the Federal Government has determined that the aroma of fresh baked bread is smell pollution and they are now regulating these small bakeries literally out of business.

So I think people understand, they can grasp that some of these regulations are nonsensical in many ways, and they are not achieving the objective that we are all looking for.

So, again, thank you very much for your time. Hopefully, we can help these bills to become enacted. Thank you so much.

We will take a 2-minute recess while we empanel our next panel of witnesses.

[Recess.]

Ms. MILLER. The committee will come to order.

It is our practice here to swear in our witnesses. So if you would all rise to take the oath.

[Witnesses sworn.]

Ms. MILLER. Thank you very much. Our first witness of our second panel is Dr. Curtis Copeland. Dr. Copeland is currently a specialist in American government at the Congressional Research Service. His specific area of expertise is Federal rulemaking and regulatory policy. Prior to moving to CRS in January 2004, Dr. Copeland was an Assistant Director at the Government Accountability Office for 23 years working on a variety of issues from Federal personnel policy to regulatory policy. He has received his Ph.D. from the University of North Texas in 1980 in political science.

Dr. Copeland, we appreciate your attendance here today and look forward to your testimony, sir.

STATEMENTS OF CURTIS W. COPELAND, SPECIALIST IN AMERICAN NATIONAL GOVERNMENT, CONGRESSIONAL RESEARCH SERVICE; J. CHRISTOPHER MIHM, MANAGING DIRECTOR, STRATEGIC ISSUES, GOVERNMENT ACCOUNTABILITY OFFICE; MARLO LEWIS, JR., SENIOR FELLOW IN ENVIRONMENTAL POLICY, COMPETITIVE ENTERPRISE INSTITUTE; AND ERIK OLSON, SENIOR ATTORNEY, NATURAL RESOURCES DEFENSE COUNCIL

STATEMENT OF CURTIS W. COPELAND

Mr. COPELAND. Thank you very much. Madam Chairman, members of the subcommittee, I am pleased to be here today to discuss previous efforts to reform the Federal rulemaking process.

Although those efforts have had vastly different purposes, almost all of them bear one common characteristic—they have not been as effective as their authors had hoped. There appear to be at least four general reasons why this is so.

One reason is the amount of discretion that is sometimes left in the hands of agencies to implement the reforms. For example, the Regulatory Flexibility Act of 1980 requires Federal agencies to assess the impact of their forthcoming regulations on small businesses and other small entities.

But it says they do not have to conduct the analysis if the head of the agency certifies that the rule would not have a "significant economic impact on a substantial number of small entities." The act does not define what a "significant impact" or a "substantial number" means, thereby giving Federal agencies discretion to determine when the act's requirements are triggered, and the agencies often use that discretion.

For example, in 1999 the Environmental Protection Agency issued a proposed rule that would have significantly lowered the threshold for reporting the use of lead under the Toxic Release Inventory program. By EPA's estimate, this report would take more than 100 hours to fill out the first time, and EPA said lowering the reporting threshold would have swept in more than 5,000 additional small businesses, costing each of them $7,500 in the first year. Nevertheless, EPA said this was not a "significant economic impact" or a "substantial number of small entities" and exempted the rule from the Regulatory Flexibility Act.

From 1996 through 1999, EPA as a whole exempted 96 percent of its rules from the act, and two offices within the Agency, the Office of Pesticides and the Office of Solid Waste, exempted 100 percent of the rules.

A second reason why some reform measures have not worked as well as expected is they were built on the flawed foundations of other reforms. For example, section 610 of the Regulatory Flexibility Act requires agencies to review their rules within 10 years of issuance to determine if they should be retained, eliminated, or changed. However, this look-back requirement is triggered only when Federal agencies determine that their rules have a significant impact on small entities.

Similarly, section 212 of the Small Business Regulatory Enforcement Fairness Act requires agencies to publish small entity compliance guides, but again only when the agency determines that the rules have a significant impact on small entities. Section 212 has other problems.

For example, the statute does not require agencies to consult with small entities to develop the compliance guides, it gives agencies total discretion to determine whether they have to be written in plain language, and does not indicate when the compliance guides have to be developed. Therefore, an agency could develop a hard to understand compliance guide years after a final rule is published with no input from small entities and still be considered in compliance with section 212.

Other regulatory reforms appear to flounder because they are limited in terms of the agencies or rules covered. For example, the Unfunded Mandates Reform Act of 1995 does not cover any rules issued by independent regulatory agencies like the Federal Communications Commission or the Securities and Exchange Commission, even though those agencies clearly issue some rules that some affected parties consider mandates. The act also does not apply to any rules issued without a previous Notice of Proposed Rulemaking, even though half of all final rules are issued without a Notice.

Finally, political and structural limitations sometimes make it difficult or impossible for regulatory reforms to achieve their intended purposes. The 1996 Congressional Review Act was initially viewed as a way for Congress to reassert itself in the rulemaking process.

However, the reality, as we have heard earlier, is it has been well short of that goal. Only 1 of the more than 39,000 rules submitted to Congress since 1996 has been disapproved. The primary reason appears to be the balance of power between Congress and the President. Because of the votes required to overcome a Presidential veto, it is very difficult for Congress to use the act to disapprove a rule that the President would like to see go into effect.

So, based on this history, how can regulatory reform be more effective in the future? The short answer is to avoid the problems that I just mentioned. First, Congress and other regulatory reformers could be as specific as possible regarding what agencies are to do, defining key terms and avoiding broad loopholes; second, avoid linking reforms to other reforms that have not been effective; and third, do not exclude any rules or agencies unless there is a good

reason for doing so. And finally, there should be a realistic assessment of the Constitutional and statutory boundaries that exist.

Madam Chairman, thank you again for inviting me to appear today at this hearing. I would be happy to answer any questions you might have.

[The prepared statement of Mr. Copeland follows:]

Statement of Curtis W. Copeland
Specialist in American National Government
Congressional Research Service

Before

The Committee on Government Reform
Subcommittee on Regulatory Affairs
House of Representatives

July 27, 2005

on
"The Effectiveness of Federal Regulatory Reform Initiatives"

Madam Chairman and Members of the Subcommittee:

I am pleased to be here today to discuss the effectiveness of previous efforts to reform the federal rulemaking process, most of which have been attempted during the past 25 years. These reform efforts have had vastly different purposes and targets, and my comments today should not be interpreted as either the Congressional Research Service or me personally being in support of or in opposition to any of them. Also, each of the reforms can be viewed from different perspectives (e.g., burden reduction, improvement in regulatory effectiveness, greater cost-effectiveness), so different people may have differing criteria for what constitutes the "effectiveness" of a reform initiative. In my testimony, I will simply compare the stated or apparent intentions of the authors of these reforms with the results that have been achieved.

In brief, it appears that most of the more prominent of these regulatory reform efforts have not achieved the results that their authors intended. There appear to be at least four general reasons why this is so:

> First, a substantial amount of discretion is sometimes left in the hands of rulemaking agencies, either directly through language in statutes and executive orders allowing agencies to decide how to proceed, or indirectly because of a lack of definition of key terms that determine whether and how certain actions are to be taken.
>
> Second, there is tendency to build new regulatory reforms on the flawed foundations of earlier reforms, thereby causing the new reforms to have the same flaws and limitations as the old ones.
>
> Third, the scope of some of the reform requirements is limited in terms of the agencies or rules covered, resulting in some reforms covering only a minority of all rules that could conceivably be covered.
>
> Fourth, political or structural limitations of the environment in which the reforms were offered can make it difficult or impossible for the reforms to achieve their intended purposes.

Before exploring each of these reasons in detail, I will briefly discuss some of the major types of regulatory reforms that have been attempted in recent decades.

Types of Regulatory Reform Initiatives

Efforts in recent decades to reform the federal regulatory process have had many different purposes — as many purposes as the problems that those reforms were intended to fix. Although these reforms are too varied for all of them to be neatly categorized, many of the more significant ones fall into three general areas: (1) efforts to require agencies to perform certain types of regulatory analysis during the rulemaking process; (2) reforms intended to give Congress or the President better control over rulemaking agencies' activities; and (3) attempts to require reviews existing rules.

Regulatory Analysis Requirements

Perhaps the most common argument cited by proponents of regulatory reform is that the costs associated with the implementation regulations often outweigh the benefits that those regulations were intended to provide (e.g., cleaner environment, safer workplaces). Another, and somewhat related, view is that more carefully crafted regulatory policies could achieve the same benefits at less cost (or achieve more ambitious goals at the same cost). To improve the effectiveness of federal rules and minimize burdens, regulatory reform proponents have frequently advocated that agencies use (or make greater use of) a range of analytic tools during the rulemaking process, including cost-benefit analysis, cost-effectiveness analysis, and risk assessment. The underlying concept is that by considering all alternatives; quantifying costs, benefits, and risk to the extent possible; and making decisions based on the resultant information, unnecessary regulation can be avoided and regulatory burden can be minimized. Others, however, have pointed out that

the data to perform these analyses are often unavailable, and that regulatory costs are often easier to measure (particularly in monetary terms) than regulatory benefits, leading to an understatement of those benefits.

Within the past 25 years, both Congress and all recent Presidents have attempted to put in place regulatory analysis requirements. The most generally applicable cost-benefit analysis requirements in the rulemaking process are found in Executive Order 12866, issued by President Clinton in 1993,[1] but are primarily traceable to President Reagan's Executive Order 12291, issued in February 1981.[2] In the Clinton executive order, agencies are generally allowed to issue new regulations only upon a "reasoned determination that the benefits of the intended regulation justify its costs,"[3] and are required to tailor regulations to impose the least burden on society needed to achieve the regulatory objective. The order also requires a cost-benefit analysis for all "economically significant" rules (e.g., rules with a $100 million impact on the economy) containing an assessment of the anticipated costs and benefits of the regulatory action and an assessment of the costs and benefits of alternatives to the regulatory action, with an explanation of why the planned action is preferable. The Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB) is required to oversee agencies' implementation of these requirements to ensure that the analyses are done and done properly.

Congress has also required federal regulatory agencies to analyze the effects of their rules before they are issued. Some of these requirements are potentially applicable to a range of regulations, while others are focused on particular types of rules. Some of the earliest such analytic requirements are contained in the Regulatory Flexibility Act (RFA) of 1980 (5 U.S.C. 601- 612). The RFA generally requires federal agencies to assess the impact of their forthcoming regulations on "small entities," which the act defines as including small businesses, small governmental jurisdictions, and certain small not-for-profit organizations. The RFA requires the analysis to describe, among other things, (1) the reasons why the regulatory action is being considered; (2) the small entities to which the proposed rule will apply and, where feasible, an estimate of their number; (3) the projected reporting, recordkeeping, and other compliance requirements of the proposed rule; and (4) any significant alternatives to the rule that would accomplish the statutory objectives while minimizing the impact on small entities.

Some of the broadest of these congressionally established analytical requirements are in title II of the Unfunded Mandates Reform Act (UMRA) of 1995 (2 U.S.C. 1532-1538).[4] Before promulgating a rule containing a mandate that may result in the expenditure of $100 million or more by the private sector or state, local, and tribal

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[1] Executive Order 12866, "Regulatory Planning and Review," *58 Federal Register* 51735, Oct. 4, 1993. To view a copy of this order, see [http://www.whitehouse.gov/omb/inforeg/eo12866.pdf].

[2] Executive Order 12291, "Federal Regulation," 46 *Federal Register* 13193, Feb. 19, 1981.

[3] The standard in Executive Order 12291 was that regulatory benefits "outweigh" costs, not just that there be a "reasoned determination" that they "justify" those costs.

[4] Title I of UMRA contains requirements applicable to congressional consideration of bills containing mandates. For a more complete discussion of UMRA, see CRS Report RS20058, *Unfunded Mandates Reform Act Summarized*, by Keith Bea and Richard S. Beth.

governments in the aggregate, UMRA requires agencies (other than independent regulatory agencies) to prepare a written statement containing a "qualitative and quantitative assessment of the anticipated costs and benefits . . . as well as the effect of the Federal mandate on health, safety, and the natural environment."[5]

Presidential and Congressional Review of Rules

Another thrust of regulatory reform initiatives in recent decades has been that regulatory agencies' activities should be under greater control of either the President or the Congress. Every President since President Nixon has attempted to put in place some type of mechanism by which some part of the Executive Office of the President would review and approve agency rulemaking. The current presidential regulatory review requirements are in Executive Order 12866, which requires most agencies to submit all significant rules to OIRA for review and approval before they are published in the *Federal Register*. OIRA is generally required to complete its review within 90 days, and agencies are required to disclose the substantive changes made to their rules during OIRA's reviews. As was the case with the analytical requirements, these presidential review requirements are largely traceable to President Reagan's Executive Order 12291, issued in 1981.

Even earlier, in 1980, Congress enacted the Paperwork Reduction Act (PRA) (44 U.S.C. 3501-3520), which replaced the ineffective Federal Reports Act of 1942 and established OIRA within OMB to provide central agency leadership and oversight of government-wide efforts to reduce unnecessary paperwork and improve the management of information resources. The PRA also requires agencies to receive OIRA approval for each information collection request before it is implemented. Within legal limits, OIRA can disapprove any collection of information (and generally stop any associated regulation) if it believes the collection is inconsistent with the requirements of the PRA.[6] The 1995 amendments to the PRA required OIRA to set a goal of at least a 10% reduction in the government-wide paperwork burden-hour estimate for each of fiscal years 1996 and 1997, a 5% goal for each of the next four fiscal years, and annual agency goals that reduce burden to the "maximum practicable opportunity."

The most prominent attempt to exert direct congressional control over rulemaking agencies was the 1996 adoption of what has been termed the "Congressional Review Act" (CRA) (5 U.S.C. 801-808). The CRA established expedited procedures by which Congress may disapprove agencies' rules by enacting a joint resolution of disapproval, with subsequent presentation to the President for signature or veto.[7] Under the CRA,

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[5] Examples of independent regulatory agencies include the Federal Communications Commission, the Securities and Exchange Commission, or the Consumer Product Safety Commission.

[6] Independent regulatory agencies can, by majority vote, void any OIRA disapproval of a proposed collection of information. Also, OIRA disapproval does not overrule a specific statutory requirement that certain information be collected.

[7] For a detailed discussion of CRA procedures, see CRS report RL31160, *Disapproval of Regulations by Congress: Procedure Under the Congressional Review Act*, by Richard S. Beth.

before any final rule can become effective it must be filed with each House of Congress and the Government Accountability Office (GAO). The act also requires federal agencies to submit to GAO and make available to each House of Congress a copy of any cost-benefit analysis prepared for the rule and a report on the agency's actions related to the RFA, UMRA, and any other relevant act or executive order. Within 60 days after Congress receives an agency's rule, excluding periods when Congress is in recess or adjournment, a Member of Congress can introduce a resolution of disapproval that, if adopted by both Houses and enacted into law, can nullify the rule, even if it has already gone into effect. Congressional disapproval under the CRA also prevents the agency from proposing to issue a "substantially similar" rule without subsequent statutory authorization.

Reviews of Existing Regulations

All of the reform efforts that I have mentioned thus far represent attempts to control the issuance of *new* rules. Many reform advocates point out that there is an enormous body of *existing* rules that impose significant burdens on business and other regulated entities. Therefore, they argue, regulatory reform must also include reviews of existing rules to ensure that they are still needed and to determine whether they can be revised to impose less burden.

Again, both Congress and all recent Presidents have either required agencies to review their existing rules for possible change, or have attempted to review those rules in other ways. For example, section 610 of the Regulatory Flexibility Act in 1980 required each federal agency to develop a plan for the review of its existing rules that have or will have a "significant economic impact on a substantial number of small entities." The purpose of this "look-back" review is to determine whether the rules should be continued without change or should be amended or rescinded to minimize their impact on small entities. Section 610 also requires agencies to publish a notice in the *Federal Register* inviting the public to comment on their reviews.

Executive Order 12866 also required agencies to reexamine their existing rules. According to the executive order, the purpose of the review is to make the agencies' regulatory programs more effective, less burdensome, or better aligned with the President's priorities and the principles specified in the order. Because of concerns that agencies were not taking this requirement seriously, President Clinton sent a memorandum to the heads of Cabinet departments and independent agencies in March 1995 directing them to, among other things, conduct a page-by-page review of all their regulations in force and eliminate or revise those that were outdated or in need of reform. In June 1995, the President announced that this effort had resulted in commitments to eliminate 16,000 pages from the CFR.[8]

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[8] To view a copy of the March 1995 memorandum,see [http://frwebgate5.access.gpo.gov/cgi-bin/waisgate.cgi?WAISdocID=976296245140+0+0+0&WAISaction=retrieve]. For a discussion of this initiative, see U.S. General Accounting Office, *Regulatory Reform: Agencies' Efforts to Eliminate and Revise Rules Yield Mixed Results*, GAO/GGD-98-3, Oct. 2, 1997.

The most recent OIRA-directed reviews of existing rules have involved the general public in the review process. In May 2001, OIRA asked the public to nominate rules that it believed should be modified or rescinded.[9] In response, OIRA received 71 nominations from 33 commenters, and decided that 23 of the rules nominated merited "high priority review." In March 2002, OIRA again solicited public comments on regulations in need of reform, and in response received more than 300 suggestions from about 1,700 commenters, some of which suggested making rules more stringent or developing new rules. This time, OIRA forwarded the suggestions to the relevant federal agencies for review and prioritization. In February 2004, OIRA requested public nomination of promising regulatory reforms relevant to the manufacturing sector. Specifically, OIRA requested that commenters suggest reforms to regulations, guidance documents, or paperwork requirements that would "improve manufacturing regulation by reducing unnecessary costs, increasing effectiveness, enhancing competitiveness, reducing uncertainty and increasing flexibility." In two hearings this year, this Subcommittee has examined this effort and, more broadly, the impact that rules can have on manufacturing.

Why Regulatory Reforms Have Not Been More Effective

These and other regulatory reform efforts enacted in the past 25 years have almost always been introduced with great fanfare and even greater expectations. And in a few cases, the reforms appear to have achieved at least some of those expectations. For example, in 1996, Congress enacted the Small Business Regulatory Enforcement Fairness Act (SBREFA) to strengthen the implementation of the RFA. One part of SBREFA required the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA) to convene panels and solicit the views of small businesses and other small entities *before* the agencies developed proposed rules that were likely to have a significant effect on small entities. By obtaining these views early in the process, before the agencies have become fixed on a particular approach, small entities reported to GAO that they were much more likely to have an impact on agencies' rules.[10] Other reforms may be having more subtle (and less detectable) effects on the rulemaking process. For example, some agencies have reported that, because of OIRA review under Executive Order 12866, they sometimes do not even submit regulations that they believe may be returned to them.

However, it appears that most of the regulatory reform initiatives implemented in the past 25 years or so have been less effective than their authors had initially hoped. Some have been less charitably described as failures.

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[9] OIRA said it requested the nominations in response to a requirement in section 628(a)(3) of the fiscal year 2000 Treasury and General Government Appropriations Act that required OMB to submit "recommendations for reform" with its report on the costs and benefits of federal regulations.

[10] U.S. General Accounting Office, *Regulatory Reform: Implementation of the Small Business Advocacy Review Panel Requirements*, GAO/GGD-98-36, March 18, 1998.

Agency Discretion in the Implementation of the Reform Requirements

One reason why some previous reform efforts have not been more effective appears related to the amount of discretion that agencies have been given in their implementation. In some cases, that discretion is directly provided to the agencies through statutory language (e.g., agencies "may" take certain actions, or are required to conduct an analysis "when feasible"). In other cases, the discretion is provided when the reform requirements are not clear, or when definitions of key terms are not provided.

It is important to recognize, however, that some measure of agency discretion in implementing the reforms is inevitable and necessary. Congress cannot anticipate all future scenarios, so it must rely on agencies to make certain decisions along the way. Also, agency implementation discretion is the flexibility that prevents the reform requirements from being imposed when there is no legitimate need for them.

One of the best known examples of a reform effort that gives agencies a great deal of discretion is the Regulatory Flexibility Act. The RFA generally requires federal agencies to assess the impact of their forthcoming regulations on small businesses and other small entities. However, the act also says that agencies do not have to conduct the analysis if the head of the issuing agency certifies that the proposed rule would not have a "significant economic impact on a substantial number of small entities." The RFA does not define "significant economic impact" or "substantial number of small entities," thereby giving federal agencies substantial discretion to determine when the act's analytical requirements are triggered.

Agencies frequently use the discretion that they have been given by the RFA. For example, in 1999, the Environmental Protection Agency issued a proposed rule that would have lowered the threshold for reporting the use of lead under the Toxic Release Inventory (TRI) program from 25,000 pounds to 10 pounds.[11] As a result, any business with 10 or more employees that used more than 10 pounds of lead per year in its manufacturing process would have to fill out a TRI report. By EPA's own estimates, the TRI report took more than 100 hours to fill out the first time, and lowering the reporting threshold would have swept in more than 5,000 small businesses, costing each of them about $7,500 the first year and more than $5,000 each subsequent year. Nevertheless, EPA certified that this rule would not have a "significant economic impact on a substantial number of small entities," so it did not trigger the requirements of the RFA.

Senator Bond asked GAO to examine EPA's compliance with the RFA, and in 2000 GAO concluded that EPA's policies — while setting a "high threshold" — were within the discretion that the RFA allows.[12] GAO pointed out that, under EPA's standards, a rule could impose *$10,000* in costs on *10,000* small businesses and still not trigger the RFA as long as those costs did not represent 1% of the businesses' annual revenue. GAO

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[11] Environmental Protection Agency, "Lead and Lead Compounds," 64 *Federal Register* 42222, Aug. 3, 1999.

[12] U.S. General Accounting Office, *Regulatory Flexibility Act: Implementation in EPA Program Offices and Proposed Lead Rule*, GAO/GGD-00-193, Sept. 20, 2000.

also determined that since 1996, EPA had certified 96% of its rules as not having a significant impact on small entities. During this same period, the office of pesticides and the office of solid waste within EPA had certified *100%* of their rules.

Another consequence of the lack of definition of key terms in the RFA is that agencies differ greatly in how they interpret key terms under the act. As a result, the level of regulatory relief available to small entities varies from agency to agency. For nearly 15 years, GAO has recommended that Congress consider amending the RFA to require the development of criteria as to whether and how agencies should conduct analyses under the act.

The RFA is not the only regulatory reform statute that raises discretion-related issues. Other statutes provide agencies more discretion in how the reforms are implemented. For example, section 223 of SBREFA, entitled "Rights of Small Entities in Enforcement Actions," requires federal agencies regulating the activities of small entities to establish a policy or program by the end of March 1997 for the reduction and, under appropriate circumstances, the waiver of civil penalties on small entities. Section 223 also gives federal agencies substantial discretion in how these requirements are to be carried out. In 2001, GAO examined the implementation of section 223 and determined that the agencies were using that discretion.[13] Some of the agencies' policies covered some civil penalty enforcement actions involving small entities, but not others. Other policies gave small entities no more penalty relief than large entities. However, because the statute required agencies only to have a "policy" on civil penalty relief, GAO concluded that these agencies' policies of giving *no* additional penalty relief were within the discretion permitted under the statute. None of the agencies indicated that its penalty relief policies were prompted by SBREFA.

The Unfunded Mandates Reform Act also gives agencies a great deal of discretion in its implementation. For example, section 202 of UMRA requires agencies to prepare "written statements" containing, among other things, estimates of future compliance costs and any disproportionate budgetary effects "if and to the extent that the agency in its sole discretion determines that accurate estimates are reasonably feasible and that such effect is relevant and material." The statute gives agencies the same discretion regarding estimates of the effects of their rules on the national economy. Therefore, an agency can omit these estimates if, in its sole discretion, it considers them inaccurate, unfeasible, irrelevant, or immaterial. Likewise, section 203 requires agencies to develop plans to involve small governments in the development of regulatory proposals that have a "significant or unique" effect on those entities. Therefore, an agency that concludes that a rule's effect on small governments will not be "significant" or "unique" can avoid this requirement. None of the agencies that GAO reviewed in its 1998 report on UMRA had developed small government plans pursuant to section 203.[14]

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[13] U.S. General Accounting Office, *Regulatory Reform: Implementation of Selected Agencies' Civil Penalty Relief Policies for Small Entities*, GAO-01-280, Feb. 20, 2001.

[14] U.S. General Accounting Office, *Unfunded Mandates: Reform Act Has Had Little Effect on Agencies' Rulemaking Actions*, GAO/GGD-98-30, Feb. 4, 1998. Some agencies had such programs, but said they were not developed because of UMRA. No subsequent reviews of agency compliance with this provision have been conducted.

Presidents have also given agencies substantial discretion in the implementation of some of the requirements they have placed on rulemaking agencies. For example, in 1987, President Reagan issued Executive Order 12612 on "Federalism," which established a set of fundamental principles and criteria for executive departments and agencies to use when formulating and implementing policies that have federalism implications.[15] The executive order also required federal agencies to prepare a "federalism assessment" whenever the responsible agency official determines that a proposed policy had sufficient federalism implications to warrant the preparation of the assessment. The assessment was required to contain certain elements (e.g., identifying the extent to which the policy would impose additional costs or burdens on the states), and was to accompany any rule submitted to OMB for review under Executive Order 12866. However, GAO examined the implementation of Executive Order 12612 and, in 1999, concluded that it had little effect on agency rulemaking.[16] Agencies prepared few federalism assessments because they concluded that their rules would not have sufficient "federalism implications" to merit an analysis, *even when they also said that the rules preempted state or local law*. In 1999, President Clinton issued Executive Order 13132 on "Federalism," which revoked Executive Order 12612. Like its predecessor, though, the new executive order provides agencies with substantial flexibility to determine which of their actions have "federalism implications" and, therefore, when they should prepare a "federalism summary impact statement."

Agency discretion is present in most federal rulemaking requirements — even the most longstanding and revered of those requirements. For example, the Administrative Procedure Act (APA) of 1946, which established the basic "notice and comment" rulemaking process, allows agencies to issue final rules without a notice of proposed rulemaking (NPRM) if the agencies can demonstrate "good cause" — i.e., that allowing the public to comment is "impracticable, unnecessary, or not in the public interest." And use of the good cause exception makes sense in certain circumstances, such as when new flight restrictions were needed quickly in the wake of the September 11, 2001, terrorist attacks. However, there is also some evidence to suggest that agencies may be overusing this "good cause" exception. For example, in 1998, GAO reported that about half of the more than 4,600 final rules issued in 1997 had no notice of proposed rulemaking.[17] Although many of these rules involved administrative or technical issues that were not likely to generate comments, the agencies indicated that some of the rules without a notice would have a $100 million impact on the economy. In some cases, it was unclear why the agency could not have issued a proposed rule. For example, one agency indicated that its rule would be in the public interest, and that constituted "good cause" not to allow the public to comment on it. In other cases the agencies said issuing proposed rules was impracticable because of statutory or other deadlines that had already passed by the time the rule was issued.

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[15] Executive Order 12612, "Federalism," 52 *Federal Register* 41685, Oct. 30, 1987.

[16] U.S. General Accounting Office, *Federalism: Previous Initiatives Have Little Effect on Agency Rulemaking*, GAO/T-GGD-99-131, June 3, 1999.

[17] U.S. General Accounting Office, *Federal Rulemaking: Agencies Often Issued Final Actions Without Proposed Rules*, GAO/GGD-98-126, Aug. 31, 1998.

Linking Requirements to Ineffective Requirements

Another reason why some regulatory reform measures have not worked as well as some expected is that the reforms have been related to or built on other reforms with some of the above-mentioned problems. For example, the "look back" requirements in section 610 of the Regulatory Flexibility Act (mandating that agencies review certain rules within 10 years of their issuance) are triggered only when the rulemaking agency determines that a rule has a "significant economic impact on a substantial number of small entities." Therefore, if an agency concludes that its rule does *not* have a "significant" impact, or that the number of small entities affected is *not* "substantial," it can avoid section 610's requirements (as well as the analytic requirements in the RFA). For this and other reasons (e.g., a lack of clarity regarding key terms), studies of agencies' implementation of section 610 have consistently indicated that few of the required look-back reviews appear to be conducted.[18]

As I mentioned earlier, Congress enacted SBREFA in 1996 to strengthen the implementation of the RFA. Section 212 of SBREFA requires agencies to publish one or more small entity compliance guides for each rule or group of related rules for which the agency is required to prepare a final regulatory flexibility analysis under the RFA. However, because this provision in SBREFA was built on the RFA, the discretion inherent in the RFA regarding whether to conduct a regulatory flexibility analysis also applies to whether compliance guides must be developed. Therefore, if the agency concludes that the final rule would not, in its opinion, have a "significant" impact on a "substantial" number of small entities, the agency is not required to prepare a compliance guide.

Section 212 of SBREFA also gives agencies discretion more directly. For example, the statute says agencies "may" prepare separate guides covering groups or classes of similarly affected small entities, and "may" cooperate with associations of small entities to develop and distribute the guides. Agencies are given "sole discretion" in the use of plain language in the guides, and the statute does not indicate when the guides must be developed or how they must be published. As a result, under section 212, it would be possible for an agency to develop a *hard to understand* compliance guide *years after* a final rule is published with *no input* from small entities, and still be considered in compliance with the act. In 2001, GAO reviewed agencies' implementation of section 212 and concluded that the requirement did not appear to have had much of an impact on agencies' rulemaking actions.[19]

Even regulatory reforms that are regarded as effective can be adversely affected by their linkage to other rulemaking requirements. For example, the EPA and OSHA small business advocacy review panels that are required by SBREFA (and have been regarded as an effective way to influence rules before the agency becomes locked into a proposal) are only required when the agency determines that a rule might have a "significant

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[18] CRS Report RL32801, *Reexamining Rules: Section 610 of the Regulatory Flexibility Act*, by Curtis W. Copeland; General Accounting Office, *Regulatory Flexibility Act: Agencies Interpretations of Review Requirements Vary*, GAO/GGD-99-55, April 2, 1999.

[19] U.S. General Accounting Office, *Regulatory Reform: Compliance Guide Requirement Has Had Little Effect on Agency Practices*, GAO-02-172, Dec. 28, 2001.

economic impact on a substantial number of small entities." Therefore, if EPA and OSHA conclude that their forthcoming proposal would not, if implemented, have such an impact on small entities, they can avoid the panel requirement.

Limited Scope of Reform Requirements

Other regulatory reforms would arguably be more effective if their scope were broader. For example, when Congress enacted the Unfunded Mandates Reform Act in 1995, it was considered one of the most important efforts to constrain the imposition of new requirements on state and local governments and businesses without new resources to implement those requirements. And, there is some evidence to indicate that the requirements that Congress placed on itself in title I of the act have had that effect, at least with regard to state and local governments.[20] However, there is little direct evidence that the requirements placed on the agencies in title II of UMRA have had much, if any, effect on the rulemaking process. One reason involves the limited number of rules that the act covers.

> First, the statute says that UMRA does not cover any rules issued by independent regulatory agencies such as the Federal Communications Commission, the Securities and Exchange Commission, or the Consumer Product Safety Commission.
>
> Second, the statute says that UMRA also does not apply to any rules issued without a previous notice of proposed rulemaking. As I indicated earlier, about half of all final rules are issued without an NPRM, so UMRA does not apply to any of those rules.
>
> Third, UMRA says that agencies need not prepare a written statement containing (among other things) an estimate of benefits and costs if the rule in question imposes an enforceable duty only as part of a voluntary program or as a condition of federal financial assistance. A number of the programs that agencies consider "voluntary" (e.g., the No Child Left Behind Act) are not viewed that way by the states or other regulated entities.
>
> Finally, the act says that agencies need not prepare an UMRA written statement if the rule will not require "expenditures" of at least $100 million. However, because some rules do not technically require "expenditures" (e.g., the rule may prevent the money from ever getting into the pockets of affected parties), UMRA does not cover them.

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[20] Congressional Budget Office, "A Review of CBO's Activities Under the Unfunded Mandates Reform Act," testimony before the House Committee on Government Reform, March 8, 2005, available at [http://www.cbo.gov/showdoc.cfm?index=6141&sequence=0]. CBO said that although Congress has rarely used UMRA's explicit enforcement mechanisms, "it has changed several pieces of legislation before enactment to either eliminate mandates or lower costs."

When GAO examined the implementation of UMRA in 1998, it concluded that the act had little effect on agency rulemaking.[21] UMRA did not cover most of the rules that GAO examined with a $100 million impact on the economy. Even when a rule was covered, UMRA did not require the agency to do much more than it was already required to do under other statutes and executive orders. GAO reached a similar conclusion in its 2004 examination of UMRA's implementation.[22]

Some observers have also criticized the limited scope of the presidential review requirements in Executive Order 12866.[23] Like its predecessor (Executive Order 12291) and UMRA, the executive order covers only executive departments and independent agencies; it does not cover rules issued by independent regulatory agencies in such areas as telecommunications, energy, and trade with an estimated effect on the economy of more than $200 billion — roughly the same as the health, safety, and environmental rules that OIRA *does* review. Advocates of extending the executive order to independent regulatory agencies' rules point out that OIRA already reviews their information collection requests under the PRA, and argue that reviewing the substance of their rules would be a logical extension of that effort. Opponents note, however, that these agencies were established to be independent of the President, and argue that including them under the scope of the executive order would violate that independence.

Political/Structural Realities and Other Constraints

In other cases, the ineffectiveness of a reform effort may have more to do with political and structural realities, or other limitations in the rulemaking environment. For example, although the Congressional Review Act was initially viewed as a way for Congress to reassert itself in the rulemaking process, checking agencies' work to ensure consistency with the intent of underlying statutes, its implementation has been well short of that goal. To date, agencies have submitted more than 39,000 rules to Congress since the CRA was enacted in March 1996, including nearly 600 "major" rules, most with a $100 million impact on the economy. Although many of even the major rules were not controversial, dozens if not hundreds of the rules submitted to Congress were publicly opposed by a number of lawmakers, and nearly 50 resolutions of disapproval have been introduced since 1996. Nevertheless, only one rule has been reversed under CRA procedures — the Department of Labor's ergonomics rule in early 2001.

Although many reasons have been offered for the CRA's lack of use (e.g., the lack of expedited legislative procedures in the House, or the lack of a neutral organization to provide Congress with information about rules),[24] the primary reason appears to be the

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[21] U.S. General Accounting Office, *Unfunded Mandates: Reform Act Has Had Little Effect on Agencies' Rulemaking Actions*, GAO/GGD-98-30, Feb. 4, 1998.

[22] U.S. General Accounting Office, *Unfunded Mandates: Analysis of Reform Act Coverage*, GAO-04-637, May 12, 2004.

[23] The Center for Regulatory Effectiveness, "A Blueprint for OMB Review of Independent Agency Regulations," March 2002, available at [http://www.thecre.com/pdf/blueprint.pdf].

[24] See, for example, CRS Report RL30116, *Congressional Review of Agency Rulemaking: An Assessment after Nullification of OSHA's Ergonomics Standard*, by Morton Rosenberg.

balance of power between the Congress and the President. Under the CRA, if the President vetoes a joint resolution of disapproval regarding a rule *that has been approved by officials in his Administration*, it requires a two-thirds vote in both chambers for Congress to disapprove the rule over the President's objection. As a result, it is very difficult for Congress to use the CRA to disapprove a rule that the President would like to see go into effect. In fact, the only time that the CRA has been used to disapprove a rule — the ergonomics rule — was when the presidency changed hands, and the incoming President wanted to see the previous Administration's rule disapproved.

The Paperwork Reduction Act is an example of a different type of conflict — here, between conflicting goals. As I mentioned previously, the 1995 amendments to the PRA required OIRA to set burden reduction goals for the next six years that would have, if they had been met, reduced the amount of federal paperwork from about 7 billion burden hours at the end of fiscal year 1995 to about 4.6 billion hours by the end of fiscal year 2001. As you well know, this reduction did not occur. In fact, by the end of fiscal year 2002, the government-wide paperwork burden estimate stood at more than 8.2 billion hours.

Why didn't federal paperwork go down? A variety of answers are possible, including increases in the population of respondents and failures in the paperwork clearance process.[25] However, at least one answer appears to be that, at the same time agencies were being told to reduce paperwork, congressional and presidential initiatives were either directly or indirectly requiring the agencies to collect *more* paperwork. Perhaps the best illustration of this is the Internal Revenue Service (IRS), which is responsible for about 80% of the federal paperwork requirements. In recent years, IRS officials have stated that the agency's paperwork requirements have increased largely because of new statutes providing new tax breaks for individuals and businesses (e.g., the American Jobs Creation Act of 2004 and the Working Families Tax Relief Act of 2004) and creating new levels of complexity.[26] In order to determine whether taxpayers are deserving of such benefits, IRS requires additional information from them — thereby increasing the agency's estimated paperwork burden. Therefore, OIRA has concluded that IRS' burden reduction actions to represent the "maximum practicable opportunity" available to the agency, and are consistent with the burden reduction goals under the PRA.

Still other constraints to certain regulatory reform initiatives appear to be the primary statutes under which regulatory agencies operate. For example, although several regulatory reforms instruct agencies like EPA and OSHA to prepare cost-benefit analyses and to issue regulations only if the benefits justify the costs, the Clean Air Act and the Occupational Safety and Health Act do not permit the agencies to consider costs in the

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[25] U.S. Government Accountability Office, *Paperwork Reduction Act: New Approach May Be Needed to Reduce Government Burden on Public*, GAO-05-424. GAO determined that certain agencies were not carrying out all of their review responsibilities under the PRA.

[26] See, for example, Mark W. Everson, Commissioner of Internal Revenue, testimony before the House Committee on Government Reform's Subcommittee on Regulatory Affairs, May 25, 2005, available at [http://reform.house.gov/UploadedFiles/IRS_testimony_PW2005.TaxPolicy--AMS.doc].

development of health standards. Of course this reasoning does not explain why, in other cases, agencies' cost-benefit studies do not consider all reasonable alternative approaches, use questionable assumptions, or otherwise develop inadequate estimates of regulatory effects. The reasons for these problems are particular to each rule on which they are based, and need to be understood in that context.

Making Regulatory Reform More Effective

Although the preceding discussion of the effectiveness of regulatory reform efforts in recent decades is rather bleak, it is important to note that the reforms may be having at least some effects that are hard to detect. For example, the weaknesses of the RFA notwithstanding, some rulemaking agencies have indicated that the act and the related provisions in SBREFA have caused them to increase their consideration of the effect of their rules on small entities, and as a result have sometimes made those rules' requirements less burdensome. Strengthened regulatory reviews under Executive Order 12866 during this Administration have also reportedly caused agencies to rethink their proposals before submitting them to OIRA. Even recognizing these more subtle effects, though, it is apparent to most observers that few of the regulatory reforms enacted during the past quarter century are performing as well as their sponsors had hoped.

Some of what have been described here as weaknesses of the reform efforts may actually have been the result of hard wrought compromises in Congress. However, if Congress chooses to reinvigorate its regulatory reform efforts, several options seem available. Perhaps the clearest and most agreed upon approach would be to learn from the past, and not use the same methods that have previously led to unsatisfactory outcomes. For example, previous experience suggests that regulatory reform efforts that are *as specific as possible* regarding what Congress wants the agencies to do (i.e., defining key terms and not providing agencies broad discretion to determine when certain analyses or what procedures should be used) are more likely to be effective. When key terms are undefined, the regulatory agencies are implicitly given the discretion to define those terms as they see fit. When agencies are told they "may," at their discretion, take some action that requires substantial cost or effort on their part, at least some agencies will seek to avoid it. Just as regulated entities do when given compliance discretion, regulatory agencies can arguably be expected to select the approach that they consider to be the least burdensome to them.

Previous experience also suggests that Congress needs to carefully *consider whether new reforms should be built on or linked to other requirements that have been shown to be problematic*. For example, linking a reform requirement (e.g., compliance assistance, pre-proposal consultation) to another requirement that is discretionary (e.g., whether a rule will have a "significant" impact on small entities) will ensure that the linked requirement is also discretionary.

Another important consideration is the scope of the reform effort. Limitations on a reform's scope by *excluding certain types of agencies or rules can make the effort much less effective and influential*. For example, given that about half of all final rules are

issued without a notice of proposed rulemaking, it is worth considering whether a reform effort should include only rules for which an NPRM has been issued. Similarly, Congress may want to consider whether future reforms should exclude entire categories of agencies from those reforms' requirements, particularly when the excluded agencies' rules have a significant impact on society.

Lastly, where Congress wants the opinions of interested parties to be seriously considered, it may often be more effective to *focus any such reforms on agency actions early in the rulemaking process.* As the SBREFA panel process indicated, interested parties can be expected to have more influence on shaping a proposal and ensuring their views are taken into account before an NPRM is issued than afterward, when the agency's positions tend to harden.

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Madam Chairman, that concludes my prepared statement. I would be happy to answer any questions that you or other Members of the Subcommittee might have.

Ms. MILLER. Thank you. We appreciate that very much.

Our next witness this morning is Chris Mihm. Mr. Mihm is the Managing Director for Strategic Issues at the GAO. In this capacity, he leads the GAO's work on governmentwide longer term broader issues designed to support the transition to a more results oriented and accountable Federal Government. He is also a fellow of the National Academy of Public Administration.

I want to thank you for your participation and welcome you to the committee hearing this morning. We look forward to your testimony, sir.

STATEMENT OF J. CHRISTOPHER MIHM

Mr. MIHM. Thank you, ma'am, I appreciate it.

Madam Chairman and Mr. Lynch, I am honored to be here today to discuss efforts to improve the Federal regulatory process and to suggest some outlines for a possible reform agenda as you move forward. I also must add, as you mentioned in your introduction of Curtis, it is a great pleasure to be here today with my former colleague from the Government Accountability Office, then it was General Accounting Office.

In that spirit, I am also happy to acknowledge that many of the reports and testimonies that form the basis of my statement were written by Curtis when he was at GAO. So it is all in the family, a lot of it, here today.

As you mentioned in your opening statement, Madam Chairman, Federal regulation is a basic tool of government. Agencies issue thousands of rules and regulations each year to implement the statutes enacted by Congress and the public policy goals. Benefits of regulation include, among other things, ensuring that the workplaces, air travel, food, and drugs are safe; that the Nation's air, water, land are not polluted; and that the appropriate amount of taxes are collected. The costs of these regulations, as you also noted, are estimated to be in the hundreds of billions of dollars, and the benefit estimates are equally high.

My bottom line today is that the recent regulatory reform initiatives have yielded mixed results. On the one hand, there have been real and important benefits associated with these initiatives that Congress has put in place, while on the other hand, they have often been less effective than were intended.

And also as a key point to consider as we move forward, while many of the initiatives have added more requirements at the beginning of the regulatory process, fewer of their provisions have focused on evaluating the actual benefits and costs of rules once implemented and using such information to revise existing regulations and inform future action. Our suggestion will be that this is where we need to augment that part of the regulatory process to have more of the retrospective and look-back provisions across the current array of regulations.

Given the size and the impact of the Federal regulations, it is no surprise that Congresses and Presidents over the last 25 years have sought to refine and reform the regulatory process. One goal of such initiatives has been to reduce regulatory burdens, but other purposes have also played an important part. Among these are efforts for more rigorous analysis of proposed rules and better infor-

mation to decisionmakers, enhancing oversight of rulemaking by Congress, including what you heard from the first panel today, and the President, and to promote greater transparency and participation in the process.

Our reviews done over the years at the request of Congress suggest that there are four overall strengths or benefits from the regulatory reform initiatives that have been put in place: First, they have certainly increased the attention directed to rules and to the rulemaking process; second, there has been increased expectations regarding the analytic support for proposed rules; third, they have encouraged and facilitated greater public participation in rulemaking; and fourth, they have improved transparency of the rulemaking process.

Despite these important strengths, the overall effectiveness of the regulatory reform initiatives, as I mentioned, has been mixed. This may be particularly true when results are compared to the originally established goals and purposes, and for many of the issues that Curtis raised. For example, despite the paperwork reduction goals under the Paperwork Reduction Act, we have repeatedly testified about the growth and burden hours imposed by the Federal information collections; I know this is a key initiative of this subcommittee, including hearings that you have recently had.

We have similarly reported that initiatives such as the Unfunded Mandates Reform Act [UMRA], the Executive orders on federalism, and requirements imposed under Section 610 of the Regulatory Flexibility Act for reviews of existing rules, have had, on balance, little impact on agencies' rulemaking.

Our reviews have identified at least four general reasons that might explain why these initiatives have not been successful. First, the limited scope and coverage of the various requirements; second, a lack of clarity regarding key terms and definitions, a point again that Curtis was making; third, uneven implementation across agencies; and fourth, a predominant focus on just one part of the regulatory process, that is agencies' development of rules.

As this subcommittee begins to develop its own regulatory agenda, two avenues provide a useful starting point in our view. First, the subcommittee may wish to broadly revisit the procedures, definitions, exemptions, and other provisions of existing initiatives to determine what changes are needed to achieve those goals.

And second, greater evaluation, often referred to as retrospective analysis or look-backs, of existing regulations and lessons learned is needed to keep the regulatory process focused on the current results that are being achieved, or not, as the case may be, and identifying successful practices in meeting emerging challenges.

With that, let me conclude. Obviously, I would be happy to take any questions that you or Mr. Lynch may have.

[The prepared statement of Mr. Mihm follows:]

United States Government Accountability Office

GAO

Testimony

Before the Subcommittee on Regulatory Affairs, Committee on Government Reform, House of Representatives

For Release on Delivery
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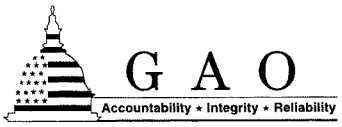
REGULATORY REFORM

Prior Reviews of Federal Regulatory Process Initiatives Reveal Opportunities for Improvements

Statement of J. Christopher Mihm
Managing Director, Strategic Issues



GAO-05-939T

July 27, 2005

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Highlights

Highlights of GAO-05-939T, a testimony before the Subcommittee on Regulatory Affairs, Committee on Government Reform, House of Representatives

REGULATORY REFORM

Prior Reviews of Federal Regulatory Process Initiatives Reveal Opportunities for Improvements

Why GAO Did This Study

Federal regulation is a basic tool of government. Agencies issue thousands of rules and regulations each year to achieve goals such as ensuring that workplaces, air travel, and foods are safe; that the nation's air, water and land are not polluted; and that the appropriate amount of taxes are collected. The costs of these regulations are estimated to be in the hundreds of billions of dollars, and the benefits estimates are even higher. Over the past 25 years, a variety of congressional and presidential regulatory reform initiatives have been instituted to refine the federal regulatory process.

This testimony discusses findings from the large number of GAO reports and testimonies prepared at the request of Congress to review the implementation of regulatory reform initiatives. Specifically, GAO discusses common strengths and weaknesses of existing reform initiatives that its work has identified. GAO also addresses some general opportunities to reexamine and refine existing initiatives and the federal regulatory process to make them more effective. GAO's prior reports and testimonies contain a variety of recommendations to improve particular reform initiatives and aspects of the regulatory process.

www.gao.gov/cgi-bin/getrpt?GAO-05-939T.

To view the full product, including the scope and methodology, click on the link above. For more information, contact J. Christopher Mihm at (202) 512-6806 or mihmj@gao.gov.

What GAO Found

GAO's evaluations of regulatory reform initiatives indicate that some of these initiatives have yielded mixed results. Among the goals of the initiatives are reducing regulatory burden, requiring more rigorous regulatory analysis, and enhancing oversight. The initiatives have been beneficial in a number of ways, but they also were often less effective than anticipated. GAO's reviews suggest at least four overall strengths or benefits associated with existing initiatives: (1) increasing the attention directed to rules and rule making, (2) increasing expectations regarding the analytical support for proposed rules, (3) encouraging and facilitating greater public participation in rule making, and (4) improving the transparency of the rule-making process. On the other hand, at least four recurring reasons help explain why reform initiatives have not been more effective: (1) limited scope and coverage of various requirements, (2) lack of clarity regarding key terms and definitions, (3) uneven implementation of the initiatives' requirements, and (4) a predominant focus on just one part of the regulatory process, agencies' development of rules.

As Congress develops its regulatory reform agenda, the lessons and opportunities identified by GAO's body of work suggest two avenues that might provide a useful starting point. The first would be to broadly revisit the procedures, definitions, exemptions, and other provisions of existing initiatives to determine whether changes are needed to better achieve their goals. As a second avenue to explore, GAO's reviews found that the regulatory process could benefit from more attention to evaluations of existing regulations, although recognizing some of the difficulties associated with carrying out such evaluations. The lessons that could be learned from retrospective reviews could help to keep the regulatory process focused on results and inform future action to meet emerging challenges.

This is a particularly timely point to be reviewing the regulatory process. The long-term fiscal imbalance facing the United States, along with other significant trends and challenges, establishes the case for change and the need to reexamine the base of the federal government and all of its existing programs, policies, functions, and activities. No single approach or reform can address all of the questions and program areas that need to be revisited. However, federal regulation is a critical tool of government, and regulatory programs play a key part in how the federal government addresses many of the country's needs. Therefore, reassessing the regulatory framework must be part of that long-term effort to transform what the federal government does and how it does it.

Madam Chairman and Members of the Subcommittee:

I am pleased to be here today to discuss reform initiatives that have been instituted over the years to improve the federal regulatory process. Congress has often asked GAO to evaluate the effectiveness of procedures and requirements established by certain initiatives. Our work included reviews of agencies' compliance with the initiatives and provided us opportunities to examine the outcomes of various reforms. My remarks today are based on this broad body of regulatory work and some of the significant common themes and lessons that have emerged.

In brief, over the last 25 years Congresses and Presidents initiated a number of regulatory reforms for a variety of purposes, such as reducing regulatory burdens or improving the information available to decision makers and the public about proposed rules. Our reviews indicated that some of these initiatives have yielded mixed results. There have been benefits associated with the initiatives, but they were often less effective than intended. Time and again we noted how features such as the limited scope of the initiatives, unclear definitions, and broad exemptions affected the results of these reforms. Also, while many of these initiatives added more requirements at the beginning of the regulatory process, fewer of their provisions have focused on evaluating the actual benefits and costs of rules once implemented and using such information to revise existing regulations and inform future action.

For these reasons, as this subcommittee begins to develop its regulatory reform agenda, we suggest two avenues that might provide a useful starting point. First, the subcommittee might wish to broadly revisit the procedures, definitions, exemptions, and other provisions of existing initiatives to determine whether changes are needed to better achieve their goals. Second, to keep the regulatory process focused on results meeting emerging challenges, we found that the process could benefit from more attention on evaluations of existing regulations and the lessons that could be learned from such retrospective reviews. This is a particularly timely point to reexamine the regulatory process because the long-term fiscal imbalance facing the United States, along with other significant trends and challenges, establishes the case for change and the need to reexamine the base of the federal government and all of its existing programs, policies,

functions, and activities.[1] Reassessing the regulatory framework must be part of that discussion.

Regulatory Reform Initiatives Reveal Some Common Strengths and Weaknesses

Federal regulation is a basic tool of government. Agencies issue thousands of rules and regulations each year to implement statutes enacted by Congress. The public policy goals and benefits of regulations include, among other things, ensuring that workplaces, air travel, foods, and drugs are safe; that the nation's air, water and land are not polluted; and that the appropriate amount of taxes is collected. The costs of these regulations are estimated to be in the hundreds of billions of dollars, and the benefits estimates are even higher.[2] Given the size and impact of federal regulation, it is no surprise that Congresses and Presidents have taken a number of actions to refine and reform the regulatory process within the past 25 years.[3] One goal of such initiatives has been to reduce regulatory burdens on affected parties, but other purposes have also played a part. Among these are efforts to require more rigorous analyses of proposed rules and thus provide better information to decision makers, to enhance oversight of rule making by Congress and the President, and to promote greater transparency and participation in the process.

Over the last decade, at the request of Congress, GAO has released over 60 reports and testimonies reviewing the implementation of various regulatory reform initiatives.[4] Some initiatives, such as the Paperwork Reduction Act (PRA), Regulatory Flexibility Act (RFA), Unfunded Mandates Reform Act (UMRA), and Executive Order 12866 on Regulatory

[1]See GAO, *21st Century Challenges: Reexamining the Base of the Federal Government*, GAO-05-325SP (Washington, D.C.: Feb. 2005), and *21st Century Challenges: Transforming Government to Meet Current and Emerging Challenges*, GAO-05-830T (Washington, D.C.: July 13, 2005).

[2]In terms of quantified and monetized annual benefits and costs, the Office of Management and Budget reported that the estimated annual benefits of major federal regulations it reviewed from October 1994 through September 2004 range from $68.1 billion to $259.6 billion, while estimated annual costs range from $34.8 billion to $39.4 billion. See Office of Management and Budget, *Draft 2005 Report to Congress on the Costs and Benefits of Federal Regulations* (Washington, D.C.: Mar. 9, 2005).

[3]See app. I for summary descriptions of major regulatory reform initiatives implemented since 1980.

[4]Attached to this statement are the highlights pages from some of those reports and testimonies.

Planning and Review, have undergone repeated scrutiny. While our reviews identified specific strengths and weaknesses of individual initiatives, it may be more worthwhile to focus on crosscutting strengths and weaknesses. The common strengths we identified largely mirror the general purposes of various reform initiatives. The common weaknesses reflect issues associated with both the design and implementation of the initiatives.

Initiatives Increase Attention on Proposed Rules and Raise Expectations of the Rule-Making Process

Our reviews suggest at least four overall strengths or benefits that have been associated with existing regulatory reform initiatives: (1) increasing the attention directed to rules and rule making, (2) increasing expectations regarding the analytical support for proposed rules, (3) encouraging and facilitating greater public participation in rule making, and (4) improving the transparency of the rule-making process.

First, the simple fact that such initiatives bring added attention to rules and the rule-making process is an important benefit. As we have pointed out in prior reports, oversight of agencies' rule making can result in useful changes to rules.[5] Furthermore, awareness of this added scrutiny may provide an important indirect effect. For example, in a previous GAO review, Department of Transportation officials told us that they will not even propose certain regulatory provisions because they know that the Office of Management and Budget (OMB), which reviews significant agency draft rules under Executive Order 12866, will not find them acceptable.[6] Similarly, there is evidence that the focus placed on potential mandates under UMRA may have helped to discourage or limit the costs of federal mandates.[7]

Second, several of the reform initiatives have increased the analytical requirements and expectations in the regulatory process. These initiatives have raised the bar for agencies regarding the information and analysis

[5]See GAO, *Rulemaking: OMB's Role in Reviews of Agencies' Draft Rules and the Transparency of Those Reviews*, GAO-03-929 (Sept. 22, 2003), and *Regulatory Reform: Procedural and Analytical Requirements in Federal Rulemaking*, GAO/T-GGD/OGC-00-157 (Washington, D.C.: June 8, 2000).

[6]GAO, *Regulatory Reform: Implementation of the Regulatory Review Executive Order*, GAO/T-GGD-96-185 (Washington, D.C.: Sept. 25, 1996).

[7]GAO, *Unfunded Mandates: Analysis of Reform Act Coverage*, GAO-04-637 (Washington, D.C.: May 12, 2004).

needed to support policy decisions underlying regulations. Simply put, the initiatives call for more analysis of the effects—both benefits and costs—of proposed regulations before they are implemented. Whether imposed by statute or executive order, these initiatives seek to answer a basic question, "What are the consequences of this rule?" Closely related are other requirements that encourage agencies to identify and consider alternatives when developing regulations. Executive Order 12866, for example, asks agencies to first identify and assess available alternatives to direct regulation. Initiatives such as RFA and UMRA ask agencies to identify regulatory alternatives that will be less burdensome to regulated parties.

Third, some of the reform initiatives have encouraged and facilitated greater public participation and consultation in rule making. Initiatives such as the E-Government Act and the Government Paperwork Elimination Act encourage agencies to allow the public to communicate with them by electronic means. Other initiatives require additional consultation by agencies with the parties that might be affected by rules under development. These initiatives ask that agencies seek input earlier in the process, rather than waiting for the public to comment on proposals published in the *Federal Register*.

A final shared strength of many of these initiatives, and one closely connected to the three previous items, is that they help to improve the transparency of the regulatory process. In prior work, we have cited transparency as a regulatory best practice.[8] By providing more information about potential effects and alternatives, requiring more documentation and justification of agencies' decisions, and facilitating public access to and queries about such information, regulatory reform initiatives can help make the process more open. We recommended that more could be done to increase transparency, and we have also highlighted the value of transparency when agencies had particularly clear and complete documentation supporting their rule making. As the Administrator of OMB's Office of Information and Regulatory Affairs (OIRA) pointed out, openness can help to "transform the public debate about regulation to one of substance ... rather than process."[9]

[8]GAO, *Certification Requirements: New Guidance Should Encourage Transparency in Agency Decisionmaking*, GAO/GGD-99-170 (Washington, D.C.: Sept. 24, 1999).

[9]See GAO-03-929.

Some Recurring Weaknesses Might Explain Why Reform Initiatives Have Not Been More Effective

Despite these strengths, the overall results and effectiveness of regulatory reform initiatives have often been mixed. This may be particularly true when results of the initiatives are compared to the goals and purposes originally established for them. For example, despite the goals set for the reduction of paperwork burdens under PRA, we have repeatedly testified about the growth in burden hours imposed by federal information collections.[10] We similarly reported that initiatives such as UMRA, the executive order on federalism, and requirements imposed under Section 610 of RFA for reviews of existing rules, have had little impact on agencies' rule making. Our reviews have identified at least four general reasons that might explain why reform initiatives have not been more effective: (1) the limited scope and coverage of various requirements, (2) lack of clarity regarding key terms and definitions, (3) uneven implementation of the initiatives' requirements, and (4) a predominant focus on just one part of the regulatory process, agencies' development of rules.

First, we have pointed out significant limits in the scope and coverage of certain reform initiatives. UMRA provides one example of the effect of definitional limitations, exceptions, and thresholds on restricting an initiative's coverage. As we noted in a report last year, part of the reason for the relatively small number of rules identified as containing mandates under UMRA could be traced to 14 different restrictions on the identification of federal mandates under the Act. Furthermore, our analysis of all 122 major or economically significant rules (generally, rules with an impact of $100 million or more) published in 2001 and 2002 also showed that more than one of these restrictions applied to 72 percent of the 65 rules that were not identified as containing federal mandates under UMRA but nonetheless appeared to result in significant financial effects on nonfederal parties.[11]

UMRA, along with RFA, also illustrates the potential domino effect of building reform requirements on other procedural requirements. Both acts only apply to rules for which an agency publishes a notice of proposed rule making. However, agencies can publish final regulatory actions without notices of proposed rule making using either good cause, categorical, or

[10]However, the total paperwork burden shrank slightly in fiscal year 2004, according to OMB estimates. See GAO, *Paperwork Reduction Act: Burden Reduction May Require a New Approach*, GAO-05-778T (Washington, D.C.: June 14, 2005).

[11]GAO-04-637.

statute-specific exceptions to the Administrative Procedure Act's notice and comment requirements.[12] In one of our prior reports, we estimated that about half of all final regulatory actions published by agencies were issued without going through the proposed rule stage.[13] Although many final rules without proposed rules were minor actions, in both that analysis and our recent UMRA review there were *major* rules that did not have notices of proposed rule making.[14]

Another recurring message in our reports has been the effect of unclear terms and definitions that affect the applicability of requirements. Combined with the discretion given rule-making agencies to interpret the requirements in reform initiatives, it is not surprising that we have observed uneven implementation across agencies. In particular, we have often cited the need to clarify key terms in the Regulatory Flexibility Act.[15] RFA requires analyses and other actions to help address concerns about the impact of regulations on small entities, but the requirements do not apply if the agency head certifies that the agency's rule will not have a "significant economic impact on a substantial number of small entities." However, the Act neither defines this key phrase nor places clear responsibility on any party to define it consistently across government. As a result, we found that agencies had different interpretations of RFA's requirements. We said in a series of reports that, if Congress wanted to strengthen the implementation of RFA, it should consider amending the Act to define the key phrases or provide some other entity with clearer authority and responsibility to interpret RFA's provisions. To date, Congress has not acted on our recommendations. Again, there is a domino

[12]The basic process by which federal agencies develop and issue regulations is spelled out in the Administrative Procedure Act. 5 U.S.C. § 553.

[13]GAO, *Federal Rulemaking: Agencies Often Published Final Actions Without Proposed Rules*, GAO/GGD-98-126 (Washington, D.C.: Aug. 31, 1998).

[14]For the analysis in GAO/GGD-98-126, 11 of 61 final major rules did not have proposed rules. For the analysis in GAO-04-637, 28 of the subset of 65 major rules mentioned above did not have proposed rules.

[15]See GAO, *Regulatory Flexibility Act: Clarification of Key Terms Still Needed*, GAO-02-491T (Washington, D.C.: Mar. 6, 2002); *Regulatory Flexibility Act: Key Terms Still Need to Be Clarified*, GAO-01-669T (Washington, D.C.: Apr. 24, 2001); *Regulatory Flexibility Act: Implementation in EPA Program Offices and Proposed Lead Rule*, GAO/GGD-00-193 (Washington, D.C.: Sept. 20, 2000); *Regulatory Flexibility Act: Agencies' Interpretations of Review Requirements Vary*, GAO/GGD-99-55 (Washington, D.C.: Apr. 2, 1999); and *Regulatory Flexibility Act: Status of Agencies' Compliance*, GAO/GGD-94-105 (Washington, D.C.: Apr. 27, 1994).

effect associated with this uncertainty, because other reform initiatives, such as the requirement for agencies to review existing rules under Section 610 of RFA and a requirement to provide compliance assistance guides to regulated entities, only apply if an agency has determined the rule will have a significant economic impact on a substantial number of small entities.

Sometimes, though, it might not be uncertainty over the provisions of an initiative that help to limit its effectiveness, but rather an agency's implementation of the requirements. For example, as noted in our recent report on the Paperwork Reduction Act, one of the provisions aimed at helping to achieve the goals of minimizing burden while maximizing utility is a requirement for chief information officers (CIO) to review and certify information collections.[16] However, our analysis of case studies showed that CIOs provided these certifications despite often missing or inadequate support from the program offices sponsoring the collections. We recommended that OMB clarify the kinds of support it asks agency CIOs to provide for certifications and that heads of certain agencies direct responsible CIOs to strengthen agency support for CIO certifications, including with regard to the necessity of collection, burden reduction efforts, and plans for the use of information collected.

Our reports over the years have also highlighted issues regarding agencies' implementation of analytical requirements, such as the economic analyses that support regulations. Although the economic performance of some federal actions is assessed prospectively, few federal actions are monitored for their economic performance retrospectively. In addition, our reviews have found that economic assessments that analyze regulations prospectively are often incomplete and inconsistent with general economic principles.[17] Moreover, the assessments are not always useful for comparisons across the government, because they are often based on different assumptions for the same key economic variables. In our recent report on UMRA, we noted that parties from various sectors expressed concerns about the accuracy and completeness of agencies' cost estimates, and some also emphasized that more needed to be done to address the

[16]GAO, *Paperwork Reduction Act: New Approach May Be Needed to Reduce Government Burden on Public*, GAO-05-424 (Washington, D.C.: May 20, 2005).

[17]See GAO, *Regulatory Reform: Agencies Could Improve Development, Documentation, and Clarity of Regulatory Economic Analyses*, GAO/RCED-98-142 (Washington, D.C.: May 26, 1998), *and Clean Air Act: Observations on EPA's Cost-Benefit Analysis of Its Mercury Control Options*, GAO-05-252 (Washington, D.C.: Feb. 28, 2005).

benefits side of the equation.[18] Our reviews have found that not all benefits are quantified and monetized by agencies, partly because of the difficulty in estimation.

Finally, although not an explicit finding in any of our reports, it is clear when stepping back to look at the big picture presented by the set of reform initiatives and our body of regulatory work that these initiatives primarily target one particular phase of the regulatory process, agencies' development of rules. While rule making is clearly an important point in the process when the specific substance and impact of regulations are most open to public debate, other phases also help determine the effectiveness of regulation. Few of the reform initiatives contain major requirements or processes that address those other phases in the life cycle of regulations—from the underlying statutory authorizations, through effective implementation and monitoring of compliance with regulatory provisions, to evaluation and revision of existing rules. For example, only UMRA explicitly addresses the potential effect of legislative proposals in creating mandates that would ultimately be implemented through regulations, and that element of UMRA has generally been viewed as among its most effective elements. We have reported that agencies sometimes have little rule-making discretion, so in some cases concerns raised about burdensome regulations are traceable to the statutes underlying the regulations, rather than a failure of an agency to comply with rule-making requirements.[19] With regard to other phases in the regulatory process, RFA is unique among statutory requirements in having a provision (Section 610) for reviews of existing rules, although it is limited to rules with significant effects on small entities. Executive Order 12866 also includes some provisions to encourage agencies to review and revise existing rules. It is not clear, however, that either the Section 610 or the executive order look back provisions have been consistently and effectively implemented.[20]

[18]GAO, *Unfunded Mandates: Views Vary About Reform Act's Strengths, Weaknesses, and Options for Improvement*, GAO-05-454 (Washington, D.C.: Mar. 31, 2005).

[19]GAO, *Regulatory Burden: Some Agencies' Claims Regarding Lack of Rulemaking Discretion Have Merit*, GAO/GGD-99-20 (Washington, D.C.: Jan. 8, 1999).

[20]See also, GAO, *Regulatory Reform: Agencies' Efforts to Eliminate and Revise Rules Yield Mixed Results*, GAO/GGD-98-3 (Washington, D.C.: Oct. 2, 1997).

Opportunities Exist to Refine Existing Reform Initiatives and Explore New Ways to Transform the Regulatory Process

As this subcommittee begins to develop its regulatory reform agenda, our body of work on regulatory issues, and also on results-oriented government management, suggests two general avenues of effort you may want to consider as useful starting points. One avenue is to revisit the procedures, definitions, exemptions, and other provisions of existing initiatives to determine whether changes might be needed to better achieve their goals. Second, the subcommittee may wish to explore options to more effectively and productively evaluate existing regulations and the results they have generated. Not only could such retrospective evaluations help to inform Congress and other policymakers about ways to improve the design of regulations and regulatory programs, but they could play a part in the overall reexamination of the base of the federal government that we have recommended in our recent work on addressing 21st century challenges.

With respect to the first avenue, my testimony to this point indicates that there are ample opportunities to revisit and refine existing regulatory reform initiatives. Although progress has been made to implement recommendations and matters for consideration we have raised in our prior reports, there are still unresolved issues. In particular, Congress may want to consider whether some provisions of existing statutory initiatives need to be amended to make those initiatives more effective. We still believe, for example, that Congress should clarify key terms and definitions in RFA or provide another entity with the authority and responsibility to do so.

We also believe there is some value to taking a broader look at how all of the pieces of existing initiatives have, or have not, contributed to achieving the purposes intended. For example, we suggested in our recent review of PRA that a new approach might be required to address burden reduction. As illustrated by our work on lessons learned about UMRA in the 10 years since it was enacted, such reviews can reveal opportunities and options for both reinforcing the strengths and addressing the weaknesses that have emerged in practice.[21] The options can take a number of different directions. For example, in our work on UMRA, concerns about the scope of coverage were most frequently raised by the many knowledgeable parties we consulted, but issues and options were also identified regarding enforcement, consultation, and the analytic framework, among other topics. In undertaking reviews of existing initiatives, it will be important to

[21]GAO-05-454.

also revisit the reasons why particular limitations and exceptions were included in the initiatives to begin with. As pointed out in the UMRA work, this probably needs to be an inclusive effort to be successful, involving all affected parties in the debate to find common ground if changes are to be accepted.

The second broad avenue I would suggest the subcommittee consider in its reform agenda would be to explore using retrospective evaluations of existing regulations. Such evaluations could help to keep the regulatory process focused on results and identify ways to better meet emerging challenges. Among the potential benefits of more retrospective analysis of federal regulations are that it could enable policymakers to better gauge actual benefits and costs and whether regulations are achieving their desired goals, bring additional accountability to the regulatory process, identify opportunities to revise existing regulations, and provide information that could lead to better decisions regarding future regulations.

In our work this year on both UMRA and economic performance measures, we clearly heard from the experts we consulted that they believe more retrospective analysis is needed and, further, that there are ways to improve the quality and credibility of the analyses that are done. In the UMRA work, parties had particularly strong views about the need for better evaluation and research of federal mandates, including those imposed by regulations. The most frequently suggested option to address this issue was to do more postimplementation evaluation of existing mandates or "look backs" at their effectiveness. As one of the parties pointed out, retrospective evaluation of regulations is useful because rules can change people's behavior in ways that cannot be predicted prior to implementation. In our recent workshop where we obtained the views of experts about the use of economic performance measures, such as a comparison of benefits and costs (net benefits) and cost-effectiveness, participants identified several gaps in the application of these measures to analyze federal regulations and programs.[22] For example, while some agencies have done retrospective economic performance assessments, the participants said that in general federal agencies often do not assess the performance of regulations or existing programs retrospectively, even though this information could be useful in managing programs. However,

[22]GAO, *Economic Performance: Highlights of a Workshop on Economic Performance Measures*, GAO-05-796SP (Washington, D.C.: July 18, 2005).

there are also challenges to effectively implementing retrospective evaluations. For example, we previously identified some of the difficulties regulatory agencies face in demonstrating the results of their work, such as identifying and collecting the data needed to demonstrate results, the diverse and complex factors that affect agencies' results (for example, the need to achieve results through the actions of third parties), and the long time period required to see results in some areas of federal regulation.[23] There is also a potential balance concern because, as I noted earlier, it may be more difficult to quantify the benefits of regulations than it is to quantify the costs.

Finally, I want to emphasize that this is a particularly timely point to be reviewing the regulatory process because of the long-term fiscal imbalance facing the United States, along with other significant trends and challenges. The 21st century challenges that we have been highlighting this year establish the case for change and the need to reexamine the base of the federal government and all of its existing programs, policies, functions, and activities. We recognize that a successful reexamination of the base of the federal government will entail multiple approaches over a period of years. No single approach or reform can address all of the questions and program areas that need to be revisited. However, federal regulation is a critical tool of government, and regulatory programs play a key part in how the federal government addresses many of the country's needs. Asking the questions necessary to begin reexamining the federal regulatory process is an important first step in the long-term effort to transform what the federal government does and how it does it.

Madam Chairman, this concludes my prepared statement. Once again, I appreciate the opportunity to testify on these important issues. I would be pleased to address any questions you or other members of the subcommittee might have at this time.

If additional information is needed regarding this testimony, please contact J. Christopher Mihm, Managing Director, Strategic Issues, at (202) 512-6806 or mihmj@gao.gov.

[23]GAO, *Managing for Results: Regulatory Agencies Identified Significant Barriers to Focusing on Results*, GAO/GGD-97-83 (Washington, D.C.: June 24, 1997).

Summary of Regulatory Reform Initiatives Implemented since 1980

Congresses and Presidents have taken a number of actions to refine and reform the regulatory process within the past 25 years. The following paragraphs summarize the general purpose, applicability, and requirements imposed by some of those regulatory reform initiatives.

Paperwork Reduction Act (PRA)

PRA[1] was originally enacted in 1980, then amended in 1986 and 1995.[2] PRA requires agencies to justify any collection of information from the public in order to minimize the paperwork burden they impose and to maximize the practical utility of the information collected.[3] The Act applies to independent and nonindependent regulatory agencies. Under PRA, agencies are required to submit all proposed information collections to the Office of Management and Budget (OMB) for approval. In their submissions, agencies must establish the need and intended use of the information, estimate the burden that the collection will impose on respondents, and show that the collection is the least burdensome way to gather the information.

PRA also established the Office of Information and Regulatory Affairs (OIRA) within OMB to provide central agency leadership and oversight of government efforts to reduce unnecessary paperwork and improve the management of information resources. Subsequent reform initiatives, including amendments of PRA, have added responsibilities for OIRA, such as making the office responsible for overseeing and reporting on agencies' compliance with new regulatory requirements. PRA of 1995, for example, included a requirement that OIRA, in consultation with agency heads, set annual governmentwide goals for the reduction of information collection burdens.

[1]44 U.S.C. §§ 3501-3520.

[2]PRA was originally enacted into law in 1980, Pub. L. No. 96-511, 94 Stat. 2812 (Dec. 11, 1980). It was reauthorized with minor amendments in 1986, Pub. L. No. 99-591, 100 Stat. 3341 (Oct. 30, 1986) and was reauthorized a second time with more significant changes in 1995, Pub. L. No. 104-13, 109 Stat. 163 (May 22, 1995).

[3]PRA generally defines a "collection of information" as the obtaining or disclosure of facts or opinions by or for an agency from 10 or more nonfederal persons. 44 U.S.C. § 3502(3). Many information collections, recordkeeping requirements, and third-party disclosures are contained in or are authorized by regulations as monitoring or enforcement tools, while others appear in separate written questionnaires.

Regulatory Flexibility Act of 1980 (RFA) and Small Business Regulatory Enforcement Fairness Act (SBREFA)

RFA[4] was enacted in response to concerns about the effect that federal regulations can have on small entities. RFA requires independent and nonindependent regulatory agencies to assess the impact of their rules on "small entities," defined as including small businesses, small governmental jurisdictions, and certain small not-for-profit organizations. Under RFA an agency must prepare an initial regulatory flexibility analysis at the time proposed rules are issued unless the head of the agency determines that the proposed rule would not have a "significant economic impact upon a substantial number of small entities." The Act also requires agencies to ensure that small entities have an opportunity to participate in the rule-making process and requires the Chief Counsel of the Small Business Administration's Office of Advocacy to monitor agencies' compliance. Further, Section 610 of RFA requires agencies to review existing rules within 10 years of promulgation that have or will have a significant impact on small entities to determine whether they should be continued without change or amended or rescinded to minimize their impact on small entities.

Congress amended RFA in 1996 with SBREFA.[5] SBREFA made certain agency actions under RFA judicially reviewable. Other provisions in SBREFA added new requirements. For example, SBREFA requires agencies to develop one or more compliance guides for each final rule or group of related final rules for which the agency is required to prepare a regulatory flexibility analysis, and the Act requires agencies to provide small entities with some form of relief from civil monetary penalties. SBREFA also requires the Environmental Protection Agency and the Occupational Safety and Health Administration to convene advocacy review panels before publishing an initial regulatory flexibility analysis.

Unfunded Mandates Reform Act of 1995 (UMRA)

UMRA[6] was enacted to address concerns about federal statutes and regulations that require nonfederal parties to expend resources to achieve legislative goals without being provided funding to cover the costs. UMRA generates information about the nature and size of potential federal mandates but does not preclude the implementation of such mandates. UMRA applies to proposed federal mandates in both legislation and

[4] 5 U.S.C. §§ 601-612.

[5] 5 U.S.C. § 601 note, 15 U.S.C. § 657.

[6] 2 U.S.C. §§ 658-658(g), 1501-1571.

regulations, but it does not apply to rules published by independent regulatory agencies. With regard to the regulatory process, UMRA requires federal agencies to prepare written statements containing a "qualitative and quantitative assessment of the anticipated costs and benefits" for any rule for which a proposed rule was published that includes a federal mandate that may result in the expenditure of $100 million or more in any 1 year by state, local, and tribal governments in the aggregate, or by the private sector.[7] For such rules, agencies are to identify and consider a reasonable number of regulatory alternatives and from those select the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule (or explain why that alternative was not selected). UMRA also includes a consultation requirement that agencies develop a process to permit elected officers of state, local, and tribal governments (or their designees) to provide input in the development of regulatory proposals containing significant intergovernmental mandates.

Congressional Review Act (CRA)

CRA[8] was enacted as part of SBREFA in 1996 to better ensure that Congress has an opportunity to review, and possibly reject, rules before they become effective. CRA established expedited procedures by which members of Congress may disapprove agencies' rules by introducing a resolution of disapproval that, if adopted by both Houses of Congress and signed by the President, can nullify an agency's rule. CRA applies to rules issued by nonindependent and independent regulatory agencies. CRA requires agencies to file final rules with both Congress and GAO before the rules can become effective.[9] GAO's role under CRA is to provide Congress with a report on each major rule (for example, rules with a $100 million impact on the economy) including GAO's assessment of the issuing agency's compliance with the procedural steps required by various acts and executive orders governing the rule-making process.[10]

[7]The dollar thresholds in UMRA are in 1996 dollars and are adjusted annually for inflation.

[8]5 U.S.C. §§ 801-808.

[9]The joint resolution process has been used only once. In Pub. L. No. 107-5, 115 Stat. 7 (Mar. 20, 2001) Congress disapproved the Department of Labor's rule on ergonomics.

[10]As of July 22, 2005, GAO has reviewed and reported to Congress on 576 rules under CRA.

Government Paperwork Elimination Act (GPEA)

Congress enacted GPEA[11] in 1998, and the Act promoted the expansion of a trend in the federal government toward using e-government applications to collect and disseminate information and forms. GPEA requires federal agencies to provide the public, when practicable, the option of submitting, maintaining, and disclosing required information—such as employment records, tax forms, and loan applications—electronically, instead of on paper. GPEA also requires agencies to guard the privacy and protect documents from being altered and encourages federal government use of a range of electronic signature alternatives when practicable.

Truth in Regulating Act (TIRA)

In 2000, Congress enacted TIRA[12] to provide a mechanism for Congress to obtain more information about certain rules. TIRA contemplated a 3-year pilot project during which GAO would perform independent evaluations of "economically significant" agency rules when requested by a chairman or ranking member of a committee of jurisdiction of either House of Congress. The independent evaluation would include an evaluation of the agency's analysis of the potential benefits, potential costs, and alternative approaches considered during the rule-making proceeding.[13] Under TIRA, GAO was required to report on its evaluations within 180 calendar days after receiving a committee request. Section 6(b) of the Act, however, provided that the pilot project would continue only if, in each fiscal year, a specific annual appropriation was made. During the 3-year period contemplated for the pilot project, Congress did not enact any specific appropriation to cover TIRA evaluations, and the authority for the 3-year pilot project expired on January 15, 2004. Congress has considered reauthorizing TIRA, and we have strongly urged that any reauthorization of TIRA continue to contain language requiring a specific annual appropriation before we are required to undertake independent evaluations of major rule makings. We have also recommended that TIRA evaluations be conducted under a pilot project basis.

[11]44 U.S.C. §3504 note.

[12]Pub. L. No. 106-312, 114 Stat. 1248 (Oct. 17, 2000); 5 U.S.C. § 801 note.

[13]TIRA defines an "independent evaluation" as a "substantive evaluation of the agency's data, methodology, and assumptions used in developing the economically significant rule, including - - (A) an explanation of how any strengths or weaknesses in those data, methodology, and assumptions support or detract from conclusions reached by the agency; and (B) the implications, if any, of those strengths or weaknesses for the rulemaking." Pub. L. No. 106-312, §3(3).

Information Quality Act (IQA)

Enacted in Section 515 of the Treasury and General Government Appropriations Act of 2001, the Information Quality Act[14] directed OMB to issue governmentwide guidelines to ensure and maximize the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by federal agencies. The Act requires OMB to issue guidelines directing all agencies to issue their own guidelines within 1 year and to establish administrative mechanisms allowing affected persons to seek and obtain correction of information maintained and disseminated by the agency. The Act also requires agencies to report periodically to the Director of OMB on the number and nature of complaints received and how such complaints were handled by the agency.

E-Government Act

The E-Government Act[15] was intended to enhance the management and promotion of electronic government services and processes. With regard to the regulatory process, the Act requires agencies, to the extent practicable, to accept public comments on proposed rules by electronic means. The Act also requires agencies to ensure that publicly accessible federal Web sites contain electronic dockets for their proposed rules, including all comments submitted on the rules and other relevant materials. The E-Government Act also established an Office of Electronic Government within OMB, headed by an administrator appointed by the President.

Related Executive Orders and Initiatives

In addition to congressional regulatory reform initiatives enacted in statutes, it is important to also recognize the key role that presidential initiatives have in the regulatory process. Centralized review of agencies' regulations within the Executive Office of the President has been part of the rule-making process for more than 30 years. The formal process by which OIRA currently reviews agencies' proposed rules and final rules is essentially unchanged since Executive Order 12866 was issued in 1993.[16] Under Executive Order 12866, OIRA reviews significant proposed and final

[14]IQA is also known as the Data Quality Act. Pub. L. No. 106-554 § 515, 114 Stat. 2763 (Dec. 12, 2001).

[15]31 U.S.C. § 507, 40 U.S.C. § 11331, 44 U.S.C. §§ 3541-3549, 3601-3606.

[16]Exec. Order No. 12866, 58 Fed. Reg. 51,735 (Sept. 30, 1993).

rules from all agencies, other than independent regulatory agencies, before they are published in the *Federal Register*.

The executive order states, among other things, that agencies should assess all costs and benefits of available regulatory alternatives, including both quantitative and qualitative measures. It also provides that agencies should select regulatory approaches that maximize net benefits (unless a statute requires another approach). Among other principles, the executive order encourages agencies to tailor regulations to impose the least burden on society needed to achieve the regulatory objectives. The executive order also established agency and OIRA responsibilities in the review of regulations, including transparency requirements. OIRA provides guidance to federal agencies on implementing the requirements of the executive order, such as guidance on preparing economic analyses required for significant rules.

There are also other orders that impose requirements on agencies during rule making, such as Executive Order 13132 on federalism that requires agencies to prepare a federalism summary impact statement for actions that have federalism implications.[17] Also, in January 2005, OMB published a final bulletin on peer review that establishes minimum standards for when peer review is required for scientific information, including stricter minimum standards for the peer review of "highly influential" scientific assessments, and the types of peer review that should be considered by agencies in different circumstances.[18] The selection of an appropriate peer review mechanism is left to the agency's discretion.

More detailed information about these various initiatives is available in the related GAO products listed at the end of this testimony.

[17]Exec. Order No. 13132, 64 Fed. Reg. 43,255 (Aug. 4, 1999).

[18]70 Fed. Reg. 2664 (Jan. 14, 2005).

Related GAO Products

Economic Performance: Highlights of a Workshop on Economic Performance Measures. GAO-05-796SP. Washington, D.C.: July 2005.

Paperwork Reduction Act: New Approach May Be Needed to Reduce Government Burden on Public. GAO-05-424. Washington, D.C.: May 20, 2005.

Unfunded Mandates: Views Vary About Reform Act's Strengths, Weaknesses, and Options for Improvement. GAO-05-454. Washington, D.C.: March 31, 2005.

21st Century Challenges: Reexamining the Base of the Federal Government. GAO-05-325SP. Washington, D.C.: February 2005.

Electronic Government: Federal Agencies Have Made Progress Implementing the E-Government Act of 2002. GAO-05-12. Washington, D.C.: December 10, 2004.

Unfunded Mandates: Analysis of Reform Act Coverage. GAO-04-637. Washington, D.C.: May 12, 2004.

Paperwork Reduction Act: Agencies' Paperwork Burden Estimates Due to Federal Actions Continue to Increase. GAO-04-676T. Washington, D.C.: April 20, 2004.

Rulemaking: OMB's Role in Reviews of Agencies' Draft Rules and the Transparency of Those Reviews. GAO-03-929. Washington, D.C.: September 22, 2003.

Electronic Rulemaking: Efforts to Facilitate Public Participation Can Be Improved. GAO-03-901. Washington, D.C.: September 17, 2003.

Civil Penalties: Agencies Unable to Fully Adjust Penalties for Inflation Under Current Law. GAO-03-409. Washington, D.C.: March 14, 2003.

Regulatory Flexibility Act: Clarification of Key Terms Still Needed. GAO-02-491T. Washington, D.C.: March 6, 2002.

Regulatory Reform: Compliance Guide Requirement Has Had Little Effect on Agency Practices. GAO-02-172. Washington, D.C.: December 28, 2001.

Federal Rulemaking: Procedural and Analytical Requirements at OSHA and Other Agencies. GAO-01-852T. Washington, D.C.: June 14, 2001.

Regulatory Reform: Implementation of Selected Agencies' Civil Penalties Relief Policies for Small Entities. GAO-01-280. Washington, D.C.: February 20, 2001.

Regulatory Flexibility Act: Implementation in EPA Program Offices and Proposed Lead Rule. GAO/GGD-00-193. Washington, D.C.: September 20, 2000.

Electronic Government: Government Paperwork Elimination Act Presents Challenges for Agencies. GAO/AIMD-00-282. Washington, D.C.: September 15, 2000.

Regulatory Reform: Procedural and Analytical Requirements in Federal Rulemaking. GAO/T-GGD/OGC-00-157. Washington, D.C.: June 8, 2000.

Federalism: Previous Initiatives Have Little Effect on Agency Rulemaking. GAO/T-GGD-99-131. Washington, D.C.: June 30, 1999.

Regulatory Accounting: Analysis of OMB's Reports on the Costs and Benefits of Federal Regulation. GAO/GGD-99-59. Washington, D.C.: April 20, 1999.

Regulatory Flexibility Act: Agencies' Interpretations of Review Requirements Vary. GAO/GGD-99-55. Washington, D.C.: April 2, 1999.

Regulatory Burden: Some Agencies' Claims Regarding Lack of Rulemaking Discretion Have Merit. GAO/GGD-99-20. Washington, D.C.: January 8, 1999.

Federal Rulemaking: Agencies Often Published Final Actions Without Proposed Rules. GAO/GGD-98-126. Washington, D.C.: August 31, 1998.

Regulatory Management: Implementation of Selected OMB Responsibilities Under the Paperwork Reduction Act. GAO/GGD-98-120. Washington, D.C.: July 9, 1998.

Regulatory Reform: Agencies Could Improve Development, Documentation, and Clarity of Regulatory Economic Analyses. GAO/RCED-98-142. Washington, D.C.: May 26, 1998.

Regulatory Reform: Implementation of Small Business Advocacy Review Panel Requirements. GAO/GGD-98-36. Washington, D.C.: March 18, 1998.

Congressional Review Act: Implementation and Coordination. GAO/T-OGC-98-38. Washington, D.C.: March 10, 1998.

Regulatory Reform: Agencies' Section 610 Review Notices Often Did Not Meet Statutory Requirements. GAO/T-GGD-98-64. Washington, D.C.: February 12, 1998.

Unfunded Mandates: Reform Act Has Had Little Effect on Agencies' Rulemaking Actions. GAO/GGD-98-30. Washington, D.C.: February 4, 1998.

Regulatory Reform: Changes Made to Agencies' Rules Are Not Always Clearly Documented. GAO/GGD-98-31. Washington, D.C.: January 8, 1998.

Regulatory Reform: Agencies' Efforts to Eliminate and Revise Rules Yield Mixed Results. GAO/GGD-98-3. Washington, D.C.: October 2, 1997.

Managing for Results: Regulatory Agencies Identified Significant Barriers to Focusing on Results. GAO-GGD-97-83. Washington, D.C.: June 24, 1997.

Regulatory Burden: Measurement Challenges and Concerns Raised by Select Companies. GAO/GGD-97-2. Washington, D.C.: November 18, 1996.

Regulatory Reform: Implementation of the Regulatory Review Executive Order. GAO/T-GGD-96-185. Washington, D.C.: September 25, 1996.

Regulatory Flexibility Act: Status of Agencies' Compliance. GAO/GGD-94-105. Washington, D.C.: April 27, 1994.

July 2005

GAO
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Highlights

Highlights of GAO-05-796SP

ECONOMIC PERFORMANCE

Highlights of a Workshop on Economic Performance Measures

Why GAO Convened This Workshop

Improving the economy and efficiency of federal programs has long been a key objective of the Government Accountability Office (GAO). To this end, GAO held a workshop on December 17, 2004, to discuss the use of economic analysis, such as benefit cost or cost effectiveness, for helping to measure the performance of federal programs. The workshop's purpose was to

- discuss the present state of economic performance measures and identify gaps in their application and the barriers and analytical issues that limit their use in helping assess the performance of federal programs and
- identify opportunities for the federal government and professional and academic institutions to improve (1) the use of economic performance measures for evaluating federal programs and (2) the general economic principles and guidance on which economic performance analysis is based.

What Participants Said

Workshop participants identified a number of issues regarding the use of economic performance analysis—benefit-cost or cost-effectiveness analysis—in evaluating federal program performance. They generally said the following:

- The quality of the economic performance assessment of federal programs has improved but is still highly variable and not sufficient to adequately inform decision makers.
- The gaps in applying economic performance measures are that they are not widely used, mechanisms for revisiting a regulation or program are lacking, retrospective analyses are often not done, and homeland security regulations present additional challenges and typically do not include economic analysis.
- Barriers include agencies' lack of resources and only limited demand from decision makers for benefit-cost analysis. In addition, some participants stated that organizational barriers called stovepipes or silos hinder communication.
- Some analytical issues that affect the application of economic performance measures are limited guidance on assessing unquantifiable benefits, equity, and distributional effects of federal actions; lack of agreement on some values for key assumptions; and lack of guidance on tools that do not monetize outcomes, such as multiobjective analysis.
- Opportunities to expand the use of measures include evaluation of existing programs retrospectively and application to homeland security issues.
- Ways to improve the general economic principles and guidance that economic performance analysis is based upon include developing a minimum set of principles and abbreviated guidelines for economic performance analysis, developing one-page summaries and scorecards of analysis results, standardizing some key values for assumptions, and creating an independent and flexible organization to provide guidance and develop standards.

www.gao.gov/cgi-bin/getrpt?GAO-05-796SP.

To view the full product, including the scope and methodology, click on the link above. For more information, contact Nancy R. Kingsbury at (202) 512-2700 or kingsburyn@gao.gov.

May 2005

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Highlights

Highlights of GAO-05-424, a report to congressional requesters

PAPERWORK REDUCTION ACT

New Approach May Be Needed to Reduce Government Burden on Public

Why GAO Did This Study

Americans spend billions of hours each year providing information to federal agencies by filling out information collections (forms, surveys, or questionnaires). A major aim of the Paperwork Reduction Act (PRA) is to balance the burden of these collections with their public benefit. Under the act, agencies' Chief Information Officers (CIO) are responsible for reviewing information collections before they are submitted to the Office of Management and Budget (OMB) for approval. As part of this review, CIOs must certify that the collections meet 10 standards set forth in the act (see table).

GAO was asked to assess, among other things, this review and certification process, including agencies' efforts to consult with the public. To do this, GAO reviewed a governmentwide sample of collections, reviewed processes and collections at four agencies that account for a large proportion of burden, and performed case studies of 12 approved collections.

What GAO Recommends

GAO recommends that OMB and the agencies take steps to improve review processes and compliance with the act. Also, the Congress may wish to consider mandating pilot projects to target some collections for rigorous analysis that includes public outreach. In commenting on a draft of this report, OMB and the agencies agreed with parts of the report and disagreed with others.

www.gao.gov/cgi-bin/getrpt?GAO-05-424.

To view the full product, including the scope and methodology, click on the link above. For more information, contact Linda Koontz at (202) 512-6240 or koontzl@gao.gov.

What GAO Found

Governmentwide, agency CIOs generally reviewed information collections and certified that they met the standards in the act. However, GAO's analysis of 12 case studies at the Internal Revenue Service (IRS) and the Departments of Veterans Affairs, Housing and Urban Development, and Labor showed that CIOs certified collections even though support was often missing or partial (see table). For example, in nine of the case studies, agencies did not provide support, as the law requires, for the standard that the collection was developed by an office with a plan and resources to use the information effectively. Because OMB instructions do not ask explicitly for this support, agencies generally did not address it. Further, although the law requires agencies both to publish notices in the *Federal Register* and to otherwise consult with the public, agencies governmentwide generally limited consultation to the publication of notices, which generated little public comment. Without appropriate support and public consultation, agencies have reduced assurance that collections satisfy the standards in the act.

Processes outside the PRA review process, which are more rigorous and involve greater public outreach, have been set up by IRS and the Environmental Protection Agency (EPA), whose missions involve numerous information collections and whose management is focused on minimizing burden. For example, each year, IRS subjects a few forms to highly detailed, in-depth analyses, including extensive outreach to the public affected and the information users. IRS reports that this process—performed on forms that have undergone CIO review and received OMB approval—has reduced burden by over 200 million hours since 2002. In contrast, for the 12 case studies, the CIO review process did not reduce burden. Without rigorous evaluative processes, agencies are unlikely to achieve the PRA goal of minimizing burden while maximizing utility.

Support Provided by Agencies for Paperwork Reduction Act Standards in 12 Case Studies

		Support provided		
Standards: The information collection—	**Total***	**Yes**	**Partial**	**No**
Is necessary for the proper performance of agency functions.	12	6	6	0
Avoids unnecessary duplication.	11	2	2	7
Reduces burden on the public, including small entities.	12	5	7	0
Uses language that is understandable to respondents.	12	1	0	11
Will be compatible with respondents' recordkeeping practices.	12	3	0	9
Indicates period for which records must be retained.	6	3	3	0
Gives required information (e.g., whether response is mandatory).	12	4	8	0
Was developed by an office with necessary plan and resources.	11	2	0	9
Uses appropriate statistical survey methodology (if applicable).	1	1	0	0
Makes appropriate use of information technology.	12	8	4	0
Total	**101**	**35**	**30**	**36**

Source: Paperwork Reduction Act, Pub. L. 104-13, 109 Stat. 173-4, sec. 3506(c)(3).

*The total is not always 12 because not all certifications applied to all collections.

March 2005

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Highlights

Highlights of GAO-05-454, a report to the Chairman, Subcommittee on Oversight of Government Management, the Federal Workforce and the District of Columbia, Committee on Homeland Security and Governmental Affairs, U.S. Senate

UNFUNDED MANDATES

Views Vary About Reform Act's Strengths, Weaknesses, and Options for Improvement

Why GAO Did This Study

The Unfunded Mandates Reform Act of 1995 (UMRA) was enacted to address concerns about federal statutes and regulations that require nonfederal parties to expend resources to achieve legislative goals without being provided federal funding to cover the costs. UMRA generates information about the nature and size of potential federal mandates on nonfederal entities to assist Congress and agency decision makers in their consideration of proposed legislation and regulations. However, it does not preclude the implementation of such mandates.

At various times in its 10-year history, Congress has considered legislation to amend various aspects of the act to address ongoing questions about its effectiveness. Most recently, GAO was asked to consult with a diverse group of parties familiar with the act and to report their views on (1) the significant strengths and weaknesses of UMRA as the framework for addressing mandate issues and (2) potential options for reinforcing the strengths or addressing the weaknesses. To address these objectives, we obtained information from 52 organizations and individuals reflecting a diverse range of viewpoints. GAO analyzed the information acquired and organized it into broad themes for analytical and reporting purposes.

GAO makes no recommendations in this report.

www.gao.gov/cgi-bin/getrpt?GAO-05-454.

To view the full product, including the scope and methodology, click on the link above. For more information, contact Orice M. Williams at (202) 512-5837, or williamso@gao.gov.

What GAO Found

The parties GAO contacted provided a significant number of comments about UMRA, specifically, and federal mandates, generally. Their views often varied across and within the five sectors we identified (academic/think tank, public interest advocacy, business, federal agencies, and state and local governments). Overall, the numerous strengths, weaknesses and options for improvement identified during the review fell into several broad themes, including UMRA-specific issues such as coverage and enforcement, among others, and more general issues about the design, funding, and evaluation of federal mandates. First, UMRA coverage was, by far, the most frequently cited issue by parties from the various sectors. Parties across most sectors that provided comments said UMRA's numerous definitions, exclusions, and exceptions leave out many federal actions that may significantly impact nonfederal entities and should be revisited. Among the most commonly suggested options were to expand UMRA's coverage to include a broader set of actions by limiting the various exclusions and exceptions and lowering the cost thresholds, which would make more federal actions mandates under UMRA. However, a few parties, primarily from the public interest advocacy sector, viewed UMRA's narrow coverage as a strength that should be maintained.

Second, parties from various sectors also raised a number of issues about federal mandates in general. In particular, they had strong views about the need for better evaluation and research of federal mandates and more complete estimates of both the direct and indirect costs of mandates on nonfederal entities. The most frequently suggested option to address these issues was more post-implementation evaluation of existing mandates or "look backs." Such evaluations of the actual performance of mandates could enable policymakers to better understand mandates' benefits, impacts and costs among other issues. In turn, developing such evaluation information could lead to the adjustment of existing mandate programs in terms of design and/or funding , perhaps resulting in more effective or efficient programs.

Going forward, the issue of unfunded mandates raises broader questions about assigning fiscal responsibilities within our federal system. Federal and state governments face serious fiscal challenges both in the short and longer term. As GAO reported in its February 2005 report entitled *21st Century Challenges: Reexamining the Base of the Federal Government* (GAO-05-325SP), the long-term fiscal challenges facing the federal budget and numerous other geopolitical changes challenging the continued relevance of existing programs and priorities warrant a national debate to review what the government does, how it does business and how it finances its priorities. Such a reexamination includes considering how responsibilities for financing public services are allocated and shared across the many nonfederal entities in the U.S. system as well.

December 2004

GAO
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Highlights

Highlights of GAO-05-12, a report to congressional requesters

ELECTRONIC GOVERNMENT

Federal Agencies Have Made Progress Implementing the E-Government Act of 2002

Why GAO Did This Study

The E-Government Act (E-Gov Act) of 2002 was enacted to promote the use of the Internet and other information technologies to improve government services for citizens, internal government operations, and opportunities for citizen participation in government.

The act directs the Office of Management and Budget (OMB) and federal agencies to take specific actions to promote electronic government. GAO was asked to review the implementation status of major provisions from Titles I and II of the act, which include provisions covering a wide range of activities across the federal government.

What GAO Recommends

GAO is making recommendations to OMB regarding implementation of the act in the areas of e-government approaches to crisis preparedness, contractor innovation, and federally funded research and development, to help ensure that the act's objectives are achieved.

In commenting on a draft of this report, officials from the Department of Homeland Security, General Services Administration, and OMB generally agreed with its content and recommendations.

What GAO Found

In most cases, OMB and federal agencies have taken positive steps toward implementing provisions of Titles I and II of the E-Gov Act that GAO reviewed. For example, OMB established the Office of E-Government, designated its Assistant Director for Information Technology (IT) and E-Government as the office's Administrator in April 2003, and published guidance to federal agencies on implementing the act in August 2003. Apart from general requirements applicable to all agencies (which GAO did not review), in most cases, OMB and designated federal agencies have taken action to address the act's requirements within stipulated time frames. For example, OMB established the Interagency Committee on Government Information in June 2003, within the deadline prescribed by the act. The committee is to develop recommendations on the categorization of government information and public access to electronic information. Similarly, in most cases where deadlines are not specified, OMB and designated federal agencies have either fully implemented the provisions or demonstrated positive action toward implementation. For example, in May 2003, the E-Government Administrator issued a memorandum detailing procedures for requesting funds from the E-Government Fund, although the act did not specify a deadline for this action. As stipulated by the act, the E-Government Fund is to be used to support projects that enable the federal government to expand its ability to conduct activities electronically.

Although the government has made progress in implementing the act, the act's requirements have not always been fully addressed. In several cases, actions taken do not satisfy the requirements of the act or no significant action has been taken. In particular, OMB has not ensured that specified activities have taken place regarding e-government approaches to crisis preparedness (a study and follow-up response), contractor innovation (establishment of a program), and federally funded research and development (support of an information repository and Web site). In these cases, either the actions OMB has taken do not fully address the act's provisions, or OMB has not yet made key decisions that would allow actions to take place. Until these issues are addressed, the government may be at risk of not fully achieving the objective of the E-Government Act to promote better use of the Internet and other information technologies to improve government services and enhance opportunities for citizen participation in government.

www.gao.gov/cgi-bin/getrpt?GAO-05-12.

To view the full product, including the scope and methodology, click on the link above. For more information, contact Linda D. Koontz at (202) 512-6240 or koontzl@gao.gov.

May 2004

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Highlights

Highlights of GAO-04-637, a report to the Chairman, Senate Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia

UNFUNDED MANDATES

Analysis of Reform Act Coverage

Why GAO Did This Study

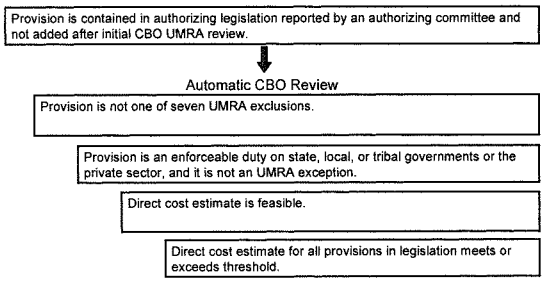
The Unfunded Mandates Reform Act of 1995 (UMRA) was enacted to address concerns about federal statutes and rules that require state, local, and tribal governments or the private sector to expend resources to achieve legislative goals. UMRA generates information about the nature and size of potential federal mandates to assist Congress and agency decision makers in their consideration of proposed legislation and rules. However, concerns about actual or perceived federal mandates continue. To provide information and analysis regarding UMRA's implementation, GAO was asked to (1) describe the applicable procedures, definitions, and exclusions under UMRA for identifying federal mandates in statutes and rules, (2) identify statutes and final rules that contained federal mandates under UMRA, and (3) provide examples of statutes and final rules that were not identified as federal mandates, but that affected parties might perceive as "unfunded mandates," and the reasons these statutes and rules were not federal mandates under UMRA. GAO focused on statutes enacted and final rules issued in 2001 and 2002 to address the second and third objectives.

What GAO Found

UMRA generally requires congressional committees and the Congressional Budget Office (CBO) to identify and estimate the costs of federal mandates contained in proposed legislation and federal agencies to do so for federal mandates contained in their rules. Identification of mandates is a complex process with multiple definitions, exclusions, and cost thresholds. Also, some legislation and rules may be enacted or issued via procedures that do not trigger UMRA reviews.

In 2001 and 2002, 5 of 377 statutes enacted and 9 of 122 major or economically significant final rules issued were identified as containing federal mandates at or above UMRA's thresholds. Of the other federal actions in those 2 years, at least 43 statutes and 65 rules contained new requirements on nonfederal parties that might be perceived as "unfunded mandates." For 24 of those statutes and 26 of those rules, CBO or federal agencies had determined that the estimated direct costs or expenditures would not meet or exceed applicable thresholds. For the remaining examples of statues, most often UMRA did not require a CBO review prior to their enactment. The remaining rules most often did not trigger UMRA because they were issued by independent regulatory agencies. Despite the determinations made under UMRA, some statutes and rules not triggering UMRA's thresholds appeared to have potential financial impacts on affected nonfederal parties similar to those of the actions that were identified as containing mandates at or above the act's thresholds.

Proposed Legislation Must Pass Multiple Steps to Be Identified as Containing Federal Mandates at or Above UMRA's Cost Thresholds



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To view the full product, including the scope and methodology, click on the link above. For more information, contact Patricia A. Dalton at (202) 512-6806 or daltonp@gao.gov.

September 2003

GAO
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Highlights

Highlights of GAO-03-929, a report to congressional requesters

RULEMAKING

OMB's Role in Reviews of Agencies' Draft Rules and the Transparency of Those Reviews

Why GAO Did This Study

Under Executive Order 12866, the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) reviews hundreds of agency rules each year before they are published in the *Federal Register*. Those reviews can have a significant effect on a broad array of public policies. GAO was asked to (1) describe OIRA's review process and any changes in its policies or processes in recent years, (2) provide detailed information about rules submitted by nine health, safety, or environmental agencies that were returned, withdrawn, or changed at OIRA's suggestion, and (3) describe how OIRA decided that certain existing rules merited high priority review.

What GAO Recommends

GAO recommends that the OMB Director build on recent improvements that have been made in the transparency of the OIRA review process. In particular, GAO recommends that agencies be instructed to document substantive changes made at OIRA's suggestion to draft rules submitted for review whenever they occur, not just changes that OIRA recommended during formal reviews.

OMB said the factual foundations of our report were well grounded but disagreed with most of our recommendations, saying that the report had not demonstrated the need or desirability of changing the agency's existing level of transparency.

www.gao.gov/cgi-bin/getrpt?GAO-03-929.

To view the full product, including the scope and methodology, click on the link above. For more information, contact Victor Rezendes at (202) 512-6806, or rezendesv@gao.gov.

What GAO Found

The formal process by which OIRA reviews agencies' proposed and final rules is essentially unchanged since Executive Order 12866 was issued in 1993. However, there have been several changes in OIRA's policies in recent years, including increased use of public letters explaining why rules were returned to the agencies and prompting the development of new rules, increased emphasis on economic analysis, stricter adherence to the 90-day time limit for OIRA review, and improvements in the transparency of the OIRA review process (although some elements of that process are still unclear). Underlying many of these changes is a shift in how recent OIRA administrators view the office's role in the rulemaking process—from "counselor" to "gatekeeper." OIRA sometimes reviews drafts of rules before they are formally submitted, and OIRA has said it can have its greatest influence on agencies' rules during this informal review period. However, OIRA contends that agencies need only document the changes made to rules during what are sometimes very brief formal review periods.

Because about 400 rules were changed, returned, or withdrawn during the 1-year period that GAO examined, the review focused on 85 rules from the nine health, safety, or environmental agencies with five or more such rules. OIRA significantly affected 25 of those 85 rules. The Environmental Protection Agency's rules were most often significantly changed, and almost all of the returned rules were from the Department of Transportation. OIRA's suggestions appeared to have at least some effect on almost all of the 25 rules' potential costs and benefits or the agencies' estimates of those costs and benefits. Outside parties contacted OIRA before or during its formal review regarding 11 of the 25 rules that OIRA significantly affected. In 7 of these 11 cases, at least some of OIRA's recommendations were similar to those of the outside parties, but we could not determine whether those contacts influenced OIRA's actions. The agencies' docket files did not always provide clear and complete documentation of the changes made during OIRA's review or at OIRA's suggestion, as required by the executive order. However, some agencies clearly documented these changes, sometimes including changes suggested during OIRA's informal reviews.

OIRA did not publicly disclose how it determined that 23 of the 71 rules nominated by the public for change or elimination in 2001 merited high priority review. As explained to GAO, OIRA desk officers made the initial determinations regarding issues with which they were familiar, subject to the approval by OIRA management. The Mercatus Center at George Mason University made most of the nominations overall and in the high priority group. Regulatory agencies or OIRA have at least begun to address the issues raised in many of the 23 suggestions. OIRA's 2002 nomination and review process was different from the 2001 process in several respects (e.g., broader request for reforms, more responses from more commentors, prioritization of the suggestions being made by the agencies, and clearer discussion of process and criteria).

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Ms. MILLER. Thank you very much.

Our next witness is Marlo Lewis. Dr. Lewis is a senior fellow at the Competitive Enterprise Institute where he writes on global warming, energy policy, and other public policy issues as well. Actually, during the 106th Congress he served as a staff director on the House Government Reform Subcommittee, at that time it was called the Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs. So it is, I suppose, a little bit back to the future for you, Dr. Lewis, to be here.

He has also published in the Washington Times and Investor's Business Daily, and the National Review. He holds a Ph.D. in government from Harvard University, and a B.A. in political science from Claremont McKenna College. We welcome you back to the subcommittee and look forward to your testimony.

STATEMENT OF MARLO LEWIS, JR.

Mr. LEWIS. Well it is certainly a pleasure to be back here. Thank you, Madam Chairman and Ranking Member Lynch, for inviting me to testify today. I want to commend the subcommittee not only for holding this hearing, but for your vigilant oversight. And more oversight by Congress I think is the short answer to the question of how we improve Federal regulations.

A lot of the statements today have already made the point that Federal regulatory costs are large, they are growing, with 4,000 new rules each year, they are also really uncontrolled in the sense that elected officials never make explicit choices about how large the regulatory burden should be in relation to the economy.

Over the years, Congress has adopted, debated, or considered numerous reform initiatives to try to in some way discipline the regulatory process. The specific elements of these proposals typically fall into one or two categories, which, for want of a better term, I would call policing reforms and checks and balances reforms. By that I mean this, policing reforms aim via rules of rulemaking and centralized review to regulate the regulators; checks and balances reforms seek to increase Congress' responsibility for regulation, foster interagency competition, or enable outside experts to compete with agency experts.

Both types I think will be needed to make the regulatory system more affordable and accountable. However, a word of caution is in order, and I think this segues very nicely into what Curtis had to say. In the past, reformers have relied heavily on policing reforms. Pinning their hopes on what James Madison called "parchment barriers," they have proceeded as if agencies could be legislated or managed into practicing sound science and economics.

In general, the results have been disappointing because rules of rulemaking are not self-enforcing, and OMB is a watchdog in constant danger of becoming a rubber stamp because the OMB Director and the agency heads are all appointed by the same President and work for the same administration.

A recent and highly effective checks and balances reform is President Bush's Executive Order 13272, proper consideration of small entities in rulemaking. This EO enables the SBA's Office of Advocacy to play a wide-ranging role in rulemaking. Advocacy provides partial relief to the monopoly that each agency otherwise

maintains over its rulemaking activity. Advocacy saves small businesses billions of dollars each year in avoided regulatory costs.

Now, I am pleased to say that all the bills that the subcommittee is considering today aim to build Congress' capacity to check and balance regulatory agencies. I think that is the right goal.

Also worthy of consideration is a modest proposal by former OIRA economist Richard Belzer. The aim of this initiative is to open the market for regulatory analysis. Various statutes and Executive orders create a huge demand or market for regulatory analysis, but it is a market in which agencies face little competition. The public is free to submit alternative cost-benefit analyses, but the agencies ultimately decide which estimates are best.

In effect, the agencies have the final say in grading their own work. They monopolize the scoring of their own regulatory proposals. But the agencies have no monopoly on regulatory expertise. Industry, the non-profit sector, State and local governments employ hundreds, perhaps thousands, of professionals trained in economic and scientific analysis.

To open the marketplace, Congress should require OMB each year to hold contests to pick the best analyses of specific major rules. OMB would be forbidden to split the difference between estimates or combine elements of different analyses. In each contest, OMB would have to pick one winner and explain the reasons to Congress for its choice.

What would this accomplish? Agencies would come under strong pressure to produce credible analyses to have at least a realistic chance of winning. An agencies' analysis would, at a minimum, have to conform to OMB's best practices guidelines and information quality guidelines.

Now some might object that making OMB the judge would give undue influence to the President or his appointees. I think that is a reasonable concern, but it is also easily addressed. If for whatever reason, you do not have sufficient trust in OMB's judgment, Rick Belzer remarks, ask GAO to evaluate the same information and reach its own conclusions. Even OMB can benefit from some competition.

Again, thank you for the opportunity to testify. I would be happy to answer any questions.

[The prepared statement of Mr. Lewis follows:]

Written Statement of Marlo Lewis
Senior Fellow in Environmental Policy
Competitive Enterprise Institute

U.S. House of Representatives
Committee on Government Reform
Subcommittee on Regulatory Affairs
July 27, 2005

Thank you, Chairwoman Miller, Ranking Member Lynch, and Members of the Subcommittee, for giving me the opportunity to comment on congressional regulatory reform initiatives.

The Competitive Enterprise Institute (CEI) is a free-market public policy group focusing on regulatory issues. My testimony is largely based on two CEI reports: the just-published 2005 edition of economist Wayne Crews' annual survey of federal regulatory trends, called *Ten Thousand Commandments*; and my March 2005 report, *Reviving Regulatory Reform: Options for the President and Congress*. I am pleased to provide copies of both reports for the press and Members of the Subcommittee.

I. Why Reform?

An old adage tells us that, "If it ain't broke, don't fix it." We have to be clear about what ails us before we can sensibly evaluate potential remedies. What are the main defects or flaws of the federal regulatory system, and how serious are they?

First, regulatory costs are large, growing, and, what is more disturbing, uncontrolled.

The Office of Management and Budget's (OMB) 2005 draft report to Congress on federal regulation estimates that the annual costs of 45 major federal rules reviewed by OMB during 1994-2004 range from $34.8 billion to $39.4 billion.[1] But those 45 rules are only a tiny fraction of the 4,000-plus rules agencies promulgate every year. Moreover, OMB's "estimate" is actually a guesstimate. OMB simply aggregates the cost estimates furnished to it by the agencies, but does not audit the agencies' analyses, vouch for their accuracy, or check the original cost projections against later cost data. OMB states that the total cost of all federal rules, major and minor, now in effect "could easily be a factor of ten or more larger" than its estimate for the 45 major rules.[2]

Even multiplying OMB's guesstimate by a factor of ten may understate regulatory costs, because it would not capture the economy-wide repercussions of the occasional regulatory disaster.

Consider the effects of botched regulatory policy on the telecommunications industry. The 1996 Telecom Act, as interpreted and implemented by the Federal Communications Commission (FCC), subjected local telephone companies to a convoluted system of price controls while forcing incumbents to lease their facilities to challengers at below-market rates. The easy availability of cross-subsidies attracted large numbers of new entrants, creating a classic bubble of too many companies chasing too few customers.[3] At the same time, construction and equipment purchases fell sharply. New entrants saw no need to build, because they could lease incumbents' facilities on the cheap; and incumbents feared that assets they might build would just end up subsidizing rivals.[4]

This "what's yours is mine" regime of bureaucratic micro-management inflicted trillion-dollar losses on a major high-tech industry. It contributed to and prolonged the recent

recession, during which some 2.8 million manufacturing jobs disappeared. None of these costs are reflected in OMB's report.

The telecom debacle aside, several types of data indicate that regulatory burdens are growing:

- The number of *Federal Register* pages per decade has increased dramatically, from 170,325 in the 1960s, to 450,821 in the 1970s, to 529,233 in the 1980s, to 622,368 in the 1990s, to 732,798 in the 2000s (based on a 5-year average).[5]
- The *Code of Federal Regulations* has grown from 22,877 pages in 1960 to 102,195 pages in 1980, to 147,639 pages today.[6]
- Federal fiscal expenditures to develop and administer rules, measured in year 2000 constant dollars, have grown from $21.4 billion in 1995, to $25.7 billion in 2000, to an estimated $36.6 billion in 2004.[7]
- The average number of rules finalized during 2000-2004 is 4,172 per year, lower than throughout the 1990s, but output remains consistently above 4,000 final rules per year.
- Agencies take more regulatory than deregulatory actions. From 1997 through the end of the Clinton Administration, 78 percent of major final rulemakings increased rather than decreased regulatory burdens. From the start of the Bush Administration through the end of 2003, 75 percent of major final rulemakings increased rather than decreased regulatory burdens.[8]

In part, regulatory costs are growing because regulatory costs are uncontrolled. Many rules function as implicit taxes, their costs embedded in the prices we pay for goods and services. Some affect growth, employment, and innovation. Yet, nothing in the current process requires or even allows elected officials to make explicit choices about the costs of regulatory programs. Regulatory costs accumulate as if by stealth.

Which brings us to a second major defect of the regulatory status quo: *Americans live under a regime of regulation without representation.*

Most regulatory decisions are made by bureaucrats—officials over whom "We, the people" have little if any control. Elected officials enact the broad regulatory statutes that govern the activities of various industries and sectors. However, Congress and the president delegate to non-elected officials the tasks not only of developing and proposing the implementing rules, but also of enacting them. Thus, elected officials largely escape responsibility for the associated costs and red tape—they only approved the law, not the regulation. As a consequence, consumers and taxpayers—those who ultimately bear the burdens and reap the benefits of regulation—cannot reward or punish anyone at the ballot box for good or bad regulatory decisions.[9]

The Constitution may not be perfect—but it is certainly better than what we have today! Congress's delegation of legislative power to administrative agencies and regulatory commissions flouts the letter and spirit of Article I §1, which vests "all legislative

powers" in Congress—not in administrative agencies. Nowhere does the Constitution authorize Congress to delegate legislative powers to other branches or bodies.

In the political theory underpinning the Constitution, governments derive "their just powers from the consent of the governed."[10] This means that all powers—legislative, executive, and judicial—originate in the people, and legitimate government arises from a compact whereby the people agree to delegate certain powers to certain offices or institutions. In a regime of delegated powers, officials are the *stewards*, not the owners of power. Just as legislatures have no right to seize powers the people have delegated to the executive, so they also have no right to transfer to the executive powers the people have delegated to them.

Because Congress delegates legislative power to agencies, it has little incentive to consider cost when drafting regulatory statutes, and almost none to insist that regulators develop economically sensible rules.

Only stale habit prevents us today from seeing the enormity of this problem. Regulations are rules of conduct with the force and effect of law. Many regulations are also implicit taxes, increasing the cost to consumers of goods and services. If asked whether bureaucrats should have the power to make laws and raise taxes, most Americans would unhesitatingly say no. Yet bureaucratic taxing and lawmaking has been business as usual in Washington for decades.

I am pleased to say that all the legislative proposals the Subcommittee is considering today address this problem. Rep. Hayworth's bill explicitly aims to enforce compliance with Article I §1, and would require Congress and the president to approve agency rules before they can take effect. Rep. Kelly's bill would enhance Congress's analytic resources to review federal rules. The bills introduced by Rep. Brown-Waite and Rep. Ney would create new joint committees for carrying out Congress's regulatory review responsibilities. CEI strongly supports all these initiatives.

II. Policing Reforms

During the past three decades, Congress has adopted, debated, or considered numerous regulatory reform proposals. The specific provisions or elements of these initiatives typically fall into one of two main categories: *policing* reforms and *checks and balances* reforms. Policing reforms aim via rules of rulemaking and centralized review to *regulate the regulators*. Checks and balances reforms seek to increase Congress's responsibility for regulatory decisions, foster inter-agency competition, or enable outside experts to compete with agency experts.

Both types will be needed to make the regulatory system more affordable and accountable. However, a word of caution is in order. In the past, reformers have relied heavily on policing reforms. Pinning their hopes on what James Madison called "parchment barriers,"[11] they have proceeded as if agencies could be legislated or

managed into practicing sound science and economics. The results have been disappointing.

Regulatory agencies exist to regulate, and they know more about their business than anyone else. They often figure out how to sidestep procedural constraints or criteria or bend them to their advantage. Consider the following examples.

Paperwork Reduction Act

Since at least 1942, Congress has sought to rein in federal paperwork burdens. In 1980, Congress and President Carter enacted the Paperwork Reduction Act (PRA), creating an Office of Information and Regulatory Affairs (OIRA) charged with minimizing paperwork. In 1995, Congress amended the PRA to set statutory paperwork reduction goals. The Act has been a persistent failure. Not only are burdens not reduced, they continually increase.

Part of the reason is that Congress keeps changing the tax code, and even changes that reduce the tax burden generate new paperwork. [12] But part of the reason is that agencies just don't care. As the Government Accountability Office (GAO) delicately puts it, internal agency review of information collection requests "has been reduced to a routine administrative process, rather than the rigorous analytical process envisioned by Congress, and does not appear to be effective in reducing the burden."[13] GAO also hints that agency reporting may understate actual paperwork burdens, because estimating burden hours is more art than science.[14]

Unfunded Mandates Relief Act (UMRA)

Title II of UMRA requires agencies to prepare a regulatory impact analysis (RIA) for any rule likely to cause lower-level governments to increase their aggregate annual expenditures by $100 million or more. The U.S. Environmental Protection Agency (EPA) estimated that the cost to states, territories, and tribal governments of its Total Maximum Daily Load (TMDL) Clean Water Act rule would not exceed $25 million annually—and thus exempted itself from having to conduct an RIA.[15] EPA's estimate seems contrived. State water pollution control administrators estimated the TMDL rule would cost $670 million to $1.2 billion annually.[16]

Regulatory Flexibility Act (RFA) and Small Business Regulatory Enforcement Fairness Act (SBREFA)

The RFA, enacted in 1980, requires each agency to determine whether its proposed and final rules will have a "significant economic impact on a substantial number of small entities." Unless the agency certifies that a proposed rule will not have such impact, and explains the reasons for such certification, it must prepare and publish in the *Federal Register* a regulatory flexibility analysis explaining the steps the agency took and the alternatives it considered to reduce small entity costs. More often than not, agencies ignored these requirements and paid scant attention to small business concerns.

In 1996, Congress enacted SBREFA to amend and put teeth into the RFA. SBREFA authorized courts to review agencies' compliance with the RFA, allowing small businesses to sue agencies for improper certification and failure to perform the requisite analyses. However, agencies have deeper pockets than small businesses, and SBREFA does not provide damage awards to winning plaintiffs.

More importantly, under SBREFA, as under the original RFA, agencies may exempt themselves from the Act's analytical requirements by certifying that a proposed rule will not have a "significant economic impact on a substantial number of small entities." GAO found that during SBREFA's first three years, EPA certified that 96 percent of its rules had no significant small entity impacts—up from 78 percent in the pre-SBREFA period. GAO suggests that EPA took advantage of the fact that SBREFA does not define what Congress meant by "significant economic impact" and "substantial number of small entities." For example, EPA certified that an August 1999 proposed rule to lower Toxic Release Inventory reporting thresholds would not have significant small entity impacts even though EPA estimated the rule would impose costs between $5,200 and $7,500 apiece on 5,600 small firms.[17] In practice, agencies have broad discretion to decide when the Act's requirements do or do not apply.

Regulatory Accounting and Centralized Review

Since the early 1970s, every president has required agencies to undertake some form of regulatory accounting, and implemented some type of central review.[18] Through executive orders and best practices documents, presidents and OMB have attempted to improve and standardize the analyses agencies undertake to develop and justify their regulatory programs. A recent GAO workshop involving 16 experts found that despite general improvement over the years, the quality of agency analyses "is still highly variable," and agency economic assessments are often "insufficient to inform decision makers whether proposed regulations and programs are achieving goals cost effectively or generating net benefits for the nation." Barriers to improvement include "a lack of demand from many decision makers to know the full costs of federal programs."[19]

Congress, for its part, has directed OMB to report on the costs and benefits of federal rules since 1996, and made that requirement permanent when it enacted the Regulatory Right to Know Act (Section 624 of the Treasury and General Government Appropriations Act of 2001). The Act requires OMB, in an annual accounting statement and associated report, to estimate the costs and benefits of federal rules in the aggregate, by agency, by program, and by major rule.

As noted earlier, this report merely compiles rather than audits agency estimates; it is not the "accounting statement" Congress wanted. In fact, as economist Richard Belzer explains, the report presents a highly distorted picture of regulatory costs and benefits:

> If errors were random, estimates of aggregate costs and benefits might be highly imprecise but they would be unbiased. However, there is both persuasive theory

> and consistent evidence that agency cost estimates are biased downward and agency benefit estimates are biased upward. When OMB aggregates dozens of downwardly biased cost estimates and upwardly biased benefit estimates, the total cost of federal regulation is understated by a lot and the total benefit of federal regulation is overstated by a lot.[20]

Agency cost-benefit assessments are unavoidably self-promotional—justifications for actions that the agency, for whatever reasons, wants to take. Why does the OMB report accept them at face value? As AEI-Brookings scholars Robert Hahn and Erin Layburn point out, the agency heads, the OMB director, and the OIRA administrator all work for the same administration and are appointed by the same president. No administration welcomes the airing of internal criticism or policy disputes. There is an inherent conflict between OMB's duty to police agency actions and its interest in advancing the president's political and policy agendas.[21]

To put it bluntly, OMB is a watchdog in constant danger of becoming a rubber stamp. The short-lived revival of the dreaded "return letter" appears to be a case in point. In 2001, OIRA Administrator John Graham chided Clinton's OMB for sending "exactly zero return letters to agencies for poor quality analysis" during the last three years of the Clinton Administration.[22] Dr. Graham vowed to revive the return letter as a stick to prod agencies into compliance with presidential criteria for cost-benefit analysis. OMB's Web site shows the following number of return letters: 14 in 2001, five in 2002, two in 2003, one in 2004, and none in 2005.[23]

Look Back Provisions

Section 5 of President Clinton's Executive Order 12866, *Regulatory Planning and Review*, requires each agency to implement a program under which it "will periodically review its existing significant regulations to determine whether any such regulations should be modified or eliminated."[24] Similarly, Section 610 of the RFA requires agencies to review small business rules within 10 years of taking effect to determine whether the regulation should be continued, revised, or rescinded.[25]

These requirements have largely been honored in the breach. Notes William Kovacs of the U.S. Chamber of Commerce: "nearly all of the items listed in the spring 2004 edition of the *Unified Agenda of Federal Regulatory and Deregulatory Actions*...involve new regulatory proposals, and the Unified Agenda does not even list existing regulations subject to review under Section 5 of Executive Order 12866."[26] GAO's workshop found that "in general federal agencies often do not assess the performance of regulations or existing programs retrospectively," and that "mechanisms often do not exist for determining whether actual performance is similar to predicted effectiveness."[27] OIRA Administrator John Graham similarly observes that most of the major rules OMB reviewed prior to publication "have never been evaluated to determine whether they have worked as intended and what their actual costs and benefits have been."[28]

Although plugging loopholes in policing reforms may have value—and I offer several suggestions in Appendix A—history suggests that agencies are artful dodgers and it is not always in OMB's interest to rein them in.

III. Checks and Balances Reforms

Some initiatives aim to inject checks and balances into the regulatory process, either by increasing Congress's responsibility for regulatory decisions, fostering inter-agency competition, or enabling outside experts to compete with agency experts. Notable examples include UMRA's point of order provision, elements of the RFA/SBREFA as strengthened by Executive Order 13272, and the Congressional Review Act.

UMRA's Point of Order Provision

UMRA requires agencies to prepare cost-benefit assessments of any rule (subject to exceptions) that may impose $100 million or more in compliance expenditures (a typical policing measure). In addition, UMRA requires the Congressional Budget Office (CBO) to determine whether bills approved by authorizing committees contain mandated expenditures and, if so, whether the direct costs are $50 million or more annually to lower-level governments or $100 million or more annually to the private sector. More critically, UMRA enables any member of Congress to raise a point of order against the consideration of legislation if it contains unfunded intergovernmental mandates exceeding $50 million. If the Chair sustains the point of order, the House or Senate has to debate and vote on whether to proceed with consideration of the bill. In effect, UMRA gives lawmakers an opportunity to affirm or deny that the benefits of a bill's unfunded mandates justify the costs before voting on the bill itself.

CBO analysis suggests that UMRA has reduced both the number and cost of unfunded mandates enacted by Congress.[29] Since passage of UMRA, the number of annual agency actions affecting state governments has fallen from 784 in 1994 to 507 in 2004—a 35 percent decline, while the number of annual agency actions affecting local governments has fallen from 533 in 1994 to 338 in 2004—a 38 percent decline.[30] This is rather remarkable, because, during the past 10 years, UMRA's point of order has almost never been invoked. Just having this option on the books seems to have a moderating effect. UMRA would be more effective if it (a) required lawmakers to cast separate votes on mandates costing $50 million before voting on the underlying legislation, and (b) applied to private-sector as well as intergovernmental mandates.

In any event, UMRA illustrates the utility of making elected officials take more responsibility for regulatory decisions.

SBREFA as Strengthened by Executive Order 13272

To strengthen RFA/SBREFA, President Bush, on August 13, 2002, issued Executive Order 13272, "Proper Consideration of Small Entities in Rulemaking." E.O. 13272 requires agencies to notify the Small Business Administration's Office of Advocacy of

draft rules expected to have a significant impact on small entities, and to consider Advocacy's comments and respond to them in the final rule. It also requires Advocacy to provide regular training to all rulemaking agencies on how to comply with the RFA.[31]

Advocacy not only finds flaws in agency certifications and flexibility analyses, it also corrects many of them. Changes agencies made in their rules responsive to Advocacy's interventions in FY 2003 reduced small business regulatory costs by more $6.3 billion in the first year and more than $5.7 billion on an ongoing annual basis.[32] In 2004, Advocacy helped save small entities more than $17 billion, for a total of $64 billion in cost savings since the start of the Bush Administration.[33]

These achievements derive from an important albeit usually neglected principle of regulatory reform: competition. Instead of attempting to manage the regulators, Advocacy competes with them (while of course providing technical assistance and friendly advice). Advocacy offers critical analysis and policy alternatives on behalf of a constituency with an indefeasible interest in cost control. In so doing, Advocacy provides partial relief from the monopoly each agency otherwise maintains over regulatory analysis and deliberation.

IV. Reform Principles and Politics

Although rules of rulemaking are necessary, policing reforms generally produce meager results. What is more, they lack popular appeal and are easily caricatured as green-eye shaded attempts to subvert public protections. CEI President Fred Smith hardly exaggerated when he described the prevailing spin on the Contract with America's cost-benefit and risk assessment proposals: "Mad-dog Republican ideologues collude with robber-baron capitalists to regain the right to put poison in baby food bottles." Even scaled-back versions of those proposals crashed and burned in the 105th and 106th Congresses.

Reformers, however, did enact UMRA and SBREFA. As noted, UMRA's point of order provision limits the number and size of new regulatory mandates affecting state and local governments. SBREFA, augmented by E.O. 13272, enables Advocacy in some measure to check and balance the rulemaking agencies.

The real if limited success of these reforms derives from both their principles and their politics. Not everybody likes cost-benefit analysis or centralized review, but everybody professes to like good government. UMRA embodies the good government principles of cost disclosure (in the form of CBO reporting on the cost of mandates in new legislation) and congressional accountability. E.O 13272 embodies the good government principle of competition.

The constituencies benefiting from these reforms enjoy broad public support and are politically mobilized. UMRA benefits state and local governments, which have considerable influence in both major parties, Congress, and the White House. SBREFA/E.O. 13272 benefits small business, which also wields great influence.

These simple reflections suggest that reformers should concentrate on initiatives that (1) visibly embody good government principles and (2) credibly advance the interests of state and local governments, small business, or both.

V. Two Applications

Appendix A includes several examples of proposals that fit those criteria. These include extending UMRA's point of order protection to the private sector, establishing a Congressional Regulatory Office, and codifying E.O. 13272 to consolidate and expand Advocacy's role in the regulatory process.

Two applications merit a more extensive discussion.

Create a Competitive Market for Regulatory Analysis

Although citizens are free to submit comments on regulatory proposals and even offer alternative cost-benefit estimates, the agencies ultimately decide which estimates are best. This is problematic, because it allows agencies to have the final say in grading their own work.

Executive orders like President Clinton's E.O. 12866 and statutes like UMRA and SBREFA create a large demand or *market* for regulatory analysis, but it is a market in which the agencies face little or no competition. As we learned in Economics 101, monopoly leads to high cost and poor quality.

Economist Rick Belzer offers an elegant solution: allow outside analyses to compete with agency analyses on a level playing field. "The Regulatory Right-to-Know Act," he notes, "gives OMB the responsibility for informing Congress concerning the benefits and costs of federal regulation, but it doesn't give OMB any statutory authority to determine whose estimates are most reliable." Congress could remedy that asymmetry by authorizing OMB, for each major rule, to hold a contest and pick a winner.[34]

The agencies monopolize the power to score regulatory proposals, but they have no monopoly on regulatory expertise. Businesses, think tanks, universities, corporations, small business associations, and state governments employ hundreds, perhaps thousands of professionals trained in economic and scientific analysis. "Open the door to competition by creating a market for high-quality, policy-neutral, and independent regulatory analysis, and they will respond," says Belzer. "The agencies also will respond—first by trying to undermine the legitimacy of their competitors, and once that fails to work, by improving the quality of their own work to avoid being driven out of the regulatory analysis business."[35]

Under Belzer's proposal, OMB would invite the public to submit analyses of regulatory proposals, and then use a procedure known as "Final Offer Arbitration" (FOA) to select the best one. He explains:

> A restricted form of FOA is used by Major League Baseball to decide whether the player's or the team's estimate of market value is most reasonable. Unlike other forms of arbitration, in FOA the arbitrator cannot negotiate amongst contending parties or devise face-saving compromises intended to ensure that everybody "wins." Because arbitrators can easily and quickly discard extreme or flamboyant positions, FOA discourages competing parties from exaggerating the strengths of their own case and the weaknesses of the others'.[36]

FOA is a winner-takes-all system. OMB would not be allowed to split the difference between, or combine elements of, competing analyses. OMB would have to select one analysis as the best. This would put pressure on all contenders to clarify assumptions and uncertainties and use sound science and economics. Thus, for example, to have a realistic chance of winning, an agency's analysis of a proposed rule would have to visibly conform to OMB's best practices and information quality guidelines.

Some might object that authorizing OMB to determine whose analysis is best would simply transfer monopoly power from the agencies to OMB, giving undue influence to the president or his appointees. That is a valid concern, but it is easily addressed. "If for whatever reason you do not have sufficient trust in OMB's judgment," says Belzer, "ask the General Accounting Office to evaluate the same information and reach its own conclusions. Even OMB can benefit from some competition."[37]

Require Congressional Approval before New Rules Become Effective

Congress would have much greater motivation to consider economic impacts when drafting regulatory statutes, and to insist that agencies consider low-cost and non-regulatory alternatives, if it had to approve final agency rules before they can take effect.

Such a plan is indeed more radical than most other regulatory reform proposals, but its radicalism lies in its fidelity to America's founding principles. "No regulation without representation" clearly echoes the words and philosophy of those who signed the Declaration of Independence. No other big-ticket regulatory reform initiative has as great a potential appeal to common-sense populism. Regulations are implicit taxes that have the force of law. To most Americans, it is obvious that nobody but their elected representatives should have the power to make laws or raise taxes.

Recasting regulatory reform as congressional reform would have obvious rhetorical advantages. How many members of Congress will want to defend the proposition that they should take no responsibility for rules promulgated under the statutes they enacted? How many public interest groups will want to argue that voters should have no one to hold accountable for regulatory burdens and red tape?

Small businesses and state governments constitute a natural support base for this approach. They are far better represented in Congress than they are in the federal regulatory bureaucracy. A Congress accountable for regulatory decisions would be far

more reluctant to pass unfunded intergovernmental mandates and far more aggressive in demanding agency compliance with the RFA.

An obvious objection is that Congress could not manage the increased workload if it had to approve 4,000-plus new regulations ever year. However, Congress could streamline a regulatory review process in several ways to ensure that it does not crowd out other essential business. Congress could limit the time allotted to debate individual rules, and limit the types of rules eligible to be debated. Congress could approve each agency's minor rules as a non-amendable package through an up-or-down vote—the procedure used to close and consolidate obsolete military bases.

Congress could also implement an accountability regime in phases, to allow for trial-and-error learning. For example, during the first two years, Congress could review only economically significant rules—those likely to have annual economic impacts of at least $100 million. The FY 2003 *Unified Agenda of Federal Regulatory and Deregulatory Actions* listed 127 new economically significant rules under consideration at the pre-rule, proposed rule, final rule, long-term, and recently completed stages. Of these, only 22 were completed agency actions.[38] Congress unquestionably could review 22 or even several dozen economically significant final rules per year without shortchanging other important business.

In later years, as Congress becomes more familiar with the process, the review threshold could be lowered to include rules imposing $50 million or more in costs on lower-level governments or the private sector, or $25 million or more on small business. All other rules—about 97 percent of the total—could be handled through various expedited procedures.

V. Conclusion

Regulatory reform is an enterprise fraught with political risk. However, the regulatory status quo is itself a source of great risk, as the regulation-induced telecom meltdown and its economic repercussions show. If war is too important to be left to the generals, then regulation is too important to be left to the regulators. Elected officials should take more responsibility for regulation, and agency experts should have to compete for public approbation with non-agency experts.

Regulatory reform is difficult, but "noble things are hard."[39] Or as we hear in sports all the time: No Guts, No Glory. Alexander Hamilton called "love of fame" "the ruling passion of the noblest minds."[40] If even a few policymakers seek the honor of renewing America's constitution of liberty, regulatory reform may yet have a political future.

APPENDIX A: COMPENDIUM OF REGULATORY REFORM OPTIONS

- ***Amend the Telecommunications Act.*** Make clear that the goal is to deregulate the telecom industry; set schedules to phase out price controls and forced-access regulation; establish regulatory parity for telephone, cable, and wireless carriers by removing, not increasing, regulatory burdens; and, prohibit state and local governments from balkanizing information networks and telecom markets.

- ***Publish an Annual Regulatory Report Card.*** OMB should produce an annual Report Card consolidating vast amounts of quantitative information already available in agency databases. Congress and the interested public would be able to see at a glance whether the number of rules affecting small businesses and localities is going up or going down, whether any significant deregulation is occurring, the minimum cost of recently adopted major rules, and whether regulatory activity at the top rulemaking agencies is primarily driven by statute or agency initiative.

- ***Create New Categories of Major Rules.*** OMB (or Congress) should require the use of new rankings or categories (Category 1, 2, 3, etc.) in official publications to better convey the full costs of the major or economically significant rules that agencies propose or adopt.

- ***Make the Rule Reform Nominations Process More Transparent.*** There currently exists no up-to-date information clearinghouse on what actions, if any, agencies are taking on public nominations of rules to be reviewed and modified or rescinded. The lack of timely information discourages the public from submitting nominations and following up on agency performance. OMB should post all nominations it receives on its Web site, and provide timely status reports about them. Further, OMB should post any items slated for OIRA or agency review in the Unified Agenda, with a hyperlink to the OMB Web site list.

- ***Extend OMB Review to Independent Agency Rulemakings.*** Several statutes—the Paperwork Reduction Act, the Information Quality Act, the Regulatory Flexibility Act, and the Regulatory Right to Know Act—create regular opportunities for OMB to review and offer comment on independent agencies' regulatory activities. Independent agencies would be under no legal obligation to heed OMB's views, but they would risk public disapprobation for ignoring good advice, failing to address reasonable criticism, or refusing to correct significant errors.

- ***SBREFA: Clarify Key Terms and Compensate Winning Plaintiffs.*** To prevent agencies from evading the duty to perform regulatory flexibility analyses, Congress should authorize SBA's Office of Advocacy to define "significant impact on a substantial number of small entities" via a notice-and-comment rulemaking. To level the legal playing field between agencies and the small entities they regulate, Congress should authorize winning small business plaintiffs

to collect compensation for damages and full reimbursement for all reasonable attorneys fees. Additionally, Congress should overturn the Supreme Court's *Buckhannon* decision so that small business plaintiffs once again qualify as prevailing and, thus, entitled to recover legal expenses if they prompt an agency to change its conduct or policy, whether or not the change is ordered by a court.

- ***Codify E.O. 13272.*** Congress should amend the RFA to codify E.O. 13272. This would ensure that agencies continue to give appropriate consideration to Advocacy's comments and address the comments in final rules after President Bush leaves office. The amended statute should also require independent agencies to work with Advocacy to develop more flexible, less costly rules affecting small business.

- ***Strengthen Section 610 of the RFA.*** Congress should amend Section 610 to require agency review of all existing small business regulations, not just those deemed to have a "significant impact on a substantial number of small entities." Each agency should also have to submit to Congress, OIRA, and the Office of Advocacy an annual report on its Section 610 review program

- ***UMRA: Shrink Regulatory Impact Assessment Loophole.*** UMRA allows agencies to avoid performing an RIA for major intergovernmental mandates if the rule's requirements specifically set forth in law. This loophole should be closed. The public has a right to know how much it will be paying whether the rule is discretionary or statutorily prescribed.

- ***Create a Competitive Market for Regulatory Analysis.*** Agencies enjoy an exclusive right to score the impacts of their regulatory proposals. This creates a classic conflict of interest, because agencies have an obvious incentive to skew cost and benefit estimates to justify their predetermined preferences and agendas. Congress should require OMB to hold a contest to determine which analysis of each major regulatory proposal is best, reviewing the rulemaking agency's analysis plus those submitted by experts in industry, state agencies, and the non-profit sector. For balance, Congress should also require GAO to provide its own independent judgment as to which analysis is best. Agencies will have to earn their credibility as regulatory experts.

- ***Extend UMRA Protections to the Private Sector.*** Just as any member of Congress can now force the House or Senate to debate and vote on whether to consider measures that would cost lower-level governments $50 million or more, so members should have the option to force Congress to debate and vote on whether to consider legislation containing $50 million mandates on the private sector, or $25 million mandates on small business.

- ***Require separate votes on large unfunded mandates.*** The House and Senate should have to cast separate votes on unfunded mandates imposing $50 million or more in annual costs on state and local governments or the private sector, or $25

million in annual costs on small business, before voting on the underlying legislation.

- ***Establish a Congressional Regulatory Office.*** OMB is a watchdog in constant peril of becoming a rubber stamp, because the OMB director and the heads of various rulemaking agencies work for the same administration and serve at the pleasure of the president. To participate effectively in regulatory decisions, and effectively check both OMB and the agencies, Congress needs an independent analytic arm—a regulatory counterpart to CBO.

- ***Require Congressional Approval before New Rules Are Effective.*** Congress will have much greater motivation to consider economic impacts when drafting regulatory statutes, and to insist that agencies consider low-cost and non-regulatory alternatives, if it has to approve final agencies rules before they can take effect. Regulations are implicit taxes that have the force of law. To most Americans, it is obvious that nobody except their elected representatives should have the power to make laws or raise taxes. Policymakers should end the current system of regulation without representation and replace it with a system of regulatory accountability.

- ***Establish a Bipartisan Regulatory Reduction Commission.*** To reduce the mass of existing federal rules, Congress should appoint a bipartisan Regulatory Reduction Commission. The Commission would review agency regulations; invite OMB, GAO, and the interested public to submit recommendations; hold hearings; and assemble a yearly package of proposed regulatory reductions. The package would be subject to an all-or-nothing vote, with no amendments allowed. Congress would send any package it approved to the president for his signature.

- ***Conduct Pilot Projects to Test the Feasibility and Desirability of Establishing Regulatory Budgets***. The ultimate goal of regulatory reform is to make agencies act more like households. However devoted to the health and safety of their members, households face inexorable tradeoffs in the use of their resources and, consequently, have strong incentives to set priorities and economize. What is most critically lacking in the regulatory arena is a budget process enabling elected officials to make explicit choices about the size of regulatory burden relative to the economy, and about the allocation of scarce resources among the myriad of regulatory objectives. Ideally, regulatory costs should be capped just like taxes and spending. However, no country has implemented this approach, and its feasibility is uncertain. Congress should authorize OMB to conduct pilot projects to explore the estimation, tracking, and enforcement issues policymakers would need to resolve before setting statutory limits on regulatory costs.

[1] Office of Information and Regulatory Affairs (OIRA), *Draft 2005 Report to Congress on the Cost and Benefits of Federal Regulation*, p. 3.
[2] *Draft 2005 Report*, p. 9.
[3] Lawrence Gasman, *Who Killed Telecom? Why the Official Story Is Wrong*, Cato Institute Policy Analysis No. 533, February 7, 2005.
[4] Stephen Pociask, *The Effects of Bargain Wholesale Prices on Local Telephone Competition: Does Helping Competitors Help Consumers?* New Millenium Council & Competitive Enterprise Institute, June 2003, http://www.cei.org/pdf/3529.pdf; Adam Thierer and Clyde Wayne Crews, Jr., *What's Yours Is Mine: Open Access and the Rise of Infrastructure Socialism* (Washington, D.C.: Cato Institute, 2003).
[5] Clyde Wayne Crews, Jr., *Ten Thousand Commandments: An Annual Snapshot of the Federal Regulatory State*, Competitive Enterprise Institute, 2005 Edition, p. 11.
[6] *Ten Thousand Commandments*, p. 12.
[7] *Ten Thousand Commandments*, p. 8.
[8] Statement of James L. Gattuso, Research Fellow in Regulatory Policy, The Heritage Foundation, House Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs, November 17, 2004, p. 4, http://www.heritage.org/Research/Regulation/tst111604a.cfm.
[9] David Schoenbrod, *Power without Responsibility: How Congress Abuses the People through Delegation* (New Haven: Yale University Press, 1993).
[10] This proposition is itself an inference from the more fundamental principle that "all men are created equal," i.e., all claims to membership in a divinely appointed ruling class or a naturally selected master race are false.
[11] *The Federalist*, No. 48.
[12] Statement of John D. Graham, Administrator, OIRA, House Government Reform Committee, July 22, 2003, pp. 8-9, http://reform.house.gov/UploadedFiles/OMB%20-%20Graham%20Testimony.pdf.
[13] Linda D. Koontz, Director, Information Management Systems, Government Accountability Office, Letter to the Honorable Candice S. Miller and the Honorable Stephen F. Lynch, July 19, 2005, p. 3, http://www.gao.gov/new.items/d05909r.pdf.
[14] Koontz, p. 4.
[15] 64 FR 46043 (August 23, 1999).
[16] Statement of David Holm, President, Association of State and Interstate Water Pollution Control Administrators, before the Senate Environment and Public Works Subcommittee on Fisheries, Wildlife, and Water, March 1, 2000, http://epw.senate.gov/107th/hol_0301.htm.
[17] GAO, *Regulatory Flexibility Act: Implementation in EPA Program Offices and Proposed Lead Rule*, GAO/GGD-00-193, September 2000.
[18] OMB, *Report to Congress*, 1997, Chapter I, pp. 6-11; Rogelio Garcia, *Federal Regulatory Reform: An Overview*, Congressional Research Service, May 22, 2001, pp. 6-8; James E. Anderson, "The struggle to reform regulatory procedures, 1978-1998," *Policy Studies Journal*, Vol. 26, 1998, pp. 1-6.
[19] GAO, *Economic Performance: Highlights of a Workshop on Economic Performance Measures*, GAO-05-796SP, July 2005, p. 4.
[20] Statement of Richard B. Belzer, Ph.D., before the Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs of the Committee on Government Reform, February 25, 2004, p. 6, http://reform.house.gov/EPNRRA/Hearings/EventSingle.aspx?EventID=785 (hereafter cited as Belzer, 2004).
[21] Robert H. Hahn and Erin M. Layburn, *Can Government Reporting Help Bring Rationality to Regulation? AEI-Brookings Joint Center for Regulatory Studies*, July 2003, pp. 11-12, http://www.aei-brookings.org/admin/authorpdfs/page.php?id=281.
[22] John D. Graham, "Presidential Management of the Regulatory State," Speech to Weidenbaum Center Forum, "Executive Regulatory Review: Surveying the Record, Making it Work," National Press Club, Washington, D.C., December 17, 2001, http://www.whitehouse.gov/omb/inforeg/graham_speech121701.html.
[23] OMB, OIRA Return Letters, http://www.whitehouse.gov/omb/inforeg/return_letter.html.
[24] Executive Order 12866, *Regulatory Planning and Review*, September 30, 1993, http://www.archives.gov/federal_register/executive_orders/pdf/12866.pdf.

[25] Regulatory Flexibility Act of 1980, as amended, http://www.sba.gov/advo/laws/regflex.html.
[26] Statement of William Kovacs, Vice President, U.S. Chamber of Commerce, before the House Government Reform Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs, November 17, 2004, p. 3, http://reform.house.gov/UploadedFiles/Kovacs_testimony1117.pdf.
[27] GAO, *Economic Performance*, p. 4.
[28] Statement of John D. Graham, Administrator, OIRA, before the House Government Reform Subcommittee on Regulatory Affairs, November 17, 2004, http://reform.house.gov/UploadedFiles/Graham_Testimony11_17jdg3.pdf.
[29] Chairman Doug Ose, Briefing Memorandum, May 18, 2001, for hearing on Unfunded Mandates, http://reform.house.gov/EPNRRA/Hearings/; Statement of Dan L. Crippen, Director, Congressional Budget Office, *Unfunded Mandates—A Five Year Review and Recommendations for* Change, House Government Reform Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs, May 24, 2001, pp. 28-30, http://reform.house.gov/UploadedFiles/Printed%20Hearing_5-24-01_Unfunded%20Mandates%20(107-19).pdf
[30] Crews, *Ten Thousand Commandments*, pp. 19, 22.
[31] Exec. Order No. 13272, 67 FR 53461 (Aug. 16, 2002), http://www.sba.gov/advo/laws/eo13272.pdf.
[32] Office of Advocacy, *Report on the Regulatory Flexibility Act*, 2003, pp. 22-25.
[33] Testimony of Thomas M. Sullivan, House Committee on Small Business, *Improving the Regulatory Flexibility Act-H.R. 682*, p. 2.
[34] Belzer, 2004, pp. 13-14.
[35] Belzer, 2004, p. 13.
[36] Belzer, 2004, p. 14.
[37] Belzer, 2004, pp. 13-14.
[38] Wayne Crews identified 22 completed economically significant actions in preparing the 2004 edition of *Ten Thousand Commandments*.
[39] Plato, *Republic*, 435c.
[40] *The Federalist*, No. 72.

Ms. MILLER. Thank you very much.

Our final witness this morning is Erik Olson. Mr. Olson is a senior attorney at the Natural Resources Defense Council, which he joined in 1991. His specialty is public health issues, including drinking water, pesticides, toxics, and food safety. From 1984 to 1986, Mr. Olson served in the Office of General Counsel for the EPA. He received his law degree from the University of Virginia, his undergraduate degree in environmental biology and management from Columbia College at Columbia University.

Mr. Olson, we certainly appreciate your coming. We look forward to your testimony.

STATEMENT OF ERIK OLSON

Mr. OLSON. Thank you for inviting me. I appreciate the opportunity to testify.

I wanted to back up just for a second and talk about the goals of all the legislation that is pending before the subcommittee. I think the two major goals are accountability and urging more effective, more beneficial regulation. I do not think anyone can disagree with that. The issue is how do we achieve that.

We have to keep in mind, first of all, that the Chief Executive is also elected, just as Members of Congress are, and ultimately the Chief Executive is responsible and accountable for regulations adopted by his or, someday, her administration. In addition, on the issue of whether we are ensuring more beneficial and more cost-effective rules, our concern with the legislation that is pending is a fewfold. One is that we feel that it is often duplicative of existing statutes that could be better implemented, and is fairly costly and burdensome to implement.

Second, we have heard repeatedly this morning discussion of what the costs are of all these regulations. I have not heard a single witness speak about the benefits of the regulations.

I just wanted to quote one of my favorite people, John Graham at OMB. His recent report to Congress, the 2005 Draft Report, found that the aggregate benefits of Federal regulation are $12 billion to $108 billion in the most recent timeframe he looked at, whereas the costs were $3.8 to $4.1 billion. So the benefits are far higher than the costs. What we need to do is be talking not just about how much it costs business, but how the American people benefit.

In addition, many of these pieces of legislation, as our written testimony lays out, raise substantial Constitutional issues in our view. For example, there are substantial "separation of powers" issues if the Chief Executive can no longer execute laws by promulgating rules without Congress ratifying them; there are issues of bicameral powers being removed by a joint committee that has been proposed; and also due process issues if we remove all judicial review of Federal regulations, which some of the legislation pending would do. These are very powerful tools that are being proposed and subject to abuse we are afraid. We are concerned that the cure may be worse than the disease.

Now, let us talk about the assumption that I think is underlying this, which is that regulations are impairing our competitiveness. This subcommittee held an earlier hearing where Professor Sid

Shapiro from Wake Forest testified that there are numerous academic studies by independent academics that demonstrate that regulations are not the cause of competitive problems, that less than 1 percent of the cost of manufacturing is regulation.

And I do not think any of the sponsors of this kind of legislation is suggesting that we want to relax our regulations to the point where we have the same rules as our competitors. Do we want Chinese labor policies or Chinese environmental policies? I do not think that is what we are aiming for. We have to look at the health benefits, the safety benefits, the environmental benefits of these rules.

Now specifically with respect to some of the legislation.

H.R. 931, the Hayworth bill, we are concerned that it basically rests on some questionable Constitutional theories and also is duplicative of what the Congressional Review Act would authorize. If Congress really has problems with specific rules, there is already something in place. Thirty-seven times a Member of Congress has proposed a resolution of disapproval.

So clearly, there is an opportunity to do that. What this legislation does is it would force Congress to review over 4,000 regulations with up to 1 hour of debate for each rule. This we fear would shut down Congress as well as shut down the Federal executive branch.

We think it raises substantial Constitutional issues. Again, Article 2, Section 3 of the Constitution says it is the President's responsibility to faithfully execute the laws. Congress passes the laws, the President executes them. If the President has no authority to execute the laws, we think there are Constitutional issues. And also questions of judicial powers under Article 3, because the courts are supposed to adjudicate whether laws and regulations are appropriate and Constitutional. The legislation we think would remove that authority.

Other issues with the other legislation are laid out in our written statement. And I would be glad to answer questions about them. Thank you.

[The prepared statement of Mr. Olson follows:]

STATEMENT OF
ERIK D. OLSON
SENIOR ATTORNEY
NATURAL RESOURCES DEFENSE COUNCIL

WITH CHRISTOPHER MURRAY
CONSULTING ATTORNEY
NATURAL RESOURCES DEFENSE COUNCIL

SUBMITTED ON BEHALF OF:

NATURAL RESOURCES DEFENSE COUNCIL
&
OMB WATCH

BEFORE THE
COMMITTEE ON GOVERNMENT REFORM
SUBCOMMITTEE ON REGULATORY AFFAIRS

AT HEARING ENTITLED:

"REGULATORY REFORM: ARE REGULATIONS HINDERING OUR COMPETITIVENESS?"

JULY 27, 2005

Good morning. I am Erik D. Olson, a Senior Attorney with the Natural Resources Defense Council (NRDC), a national non-profit public interest organization dedicated to the protection of public health and the environment, with over 500,000 members. I specialize in public health issues including drinking water, pesticides, toxics, and food safety, and also have certain broader responsibilities at NRDC. I am a former attorney for EPA's Office of General Counsel and have taught environmental law classes and seminars. Christopher Murray, a consulting attorney with NRDC, assisted in the preparation of this testimony.

We thank the Chairwoman and members of the Subcommittee for the opportunity to offer our views on whether regulations are hindering our competitiveness and, more specifically, on the legislation before this Subcommittee.

The four bills before you – H.R. 931, H.R. 1167, H.R. 576, and H.R. 3148 – represent several approaches to restricting or guiding Executive Branch agencies' activities in issuing rules to execute federal laws passed by Congress. The bills' goal apparently is to assure that agencies produce beneficial, cost-effective protections. Unfortunately, none of the proposals being discussed today achieves this important goal.

Instead, it is our view that the proposals would cause more public harm than good, because:

1) **the proposals are duplicative, burdensome, and costly;**

2) **the proposals are solutions in search of a problem;**

3) **some of the proposals raise substantial constitutional questions, including separation of powers, separation of bicameral powers, and due process issues that are deeply troubling; and,**

4) **finally, these proposals provide potentially powerful tools, which if used inappropriately, could serve as a potent weapon to shut down government and eviscerate public health, safety, and environmental protections.**

No Regulation – Competitiveness Link
It also is important to question the assumption upon which these bills apparently rest. As the title of today's hearing suggests, some have alleged that regulations often harm our competitiveness. In fact, many experts have concluded otherwise. As Sidney Shapiro, University Distinguished Professor of Law at Wake Forest University recently summarized in his testimony before this subcommittee, "the scholarly literature provides little or no support for the conclusion that regulation hinders the competitiveness of manufacturing industries or is the cause of significant job losses in those industries. The primary reason that Federal regulation is not responsible for American manufacturers being less competitive is because ***regulatory costs average less than one percent of the total value of manufactured goods*** in the United States."*

I. H.R. 931, the Congressional Responsibility Act of 2005

The "Congressional Responsibility Act of 2005" (Mr. Hayworth, H.R. 931), would prohibit almost all regulations from taking effect until Congress affirmatively voted to enact them into law. Of the four bills being discussed today, it is the most problematic and poses a significant risk of being successfully challenged on constitutional grounds for violating the principle of separation-of-powers.

H.R. 931 would bog down Congress and regulatory agencies in a mountain of paperwork.
According to John Graham, Administrator of the Office of Information and Regulatory Affairs (OIRA) at the Office of Management and Budget (OMB), Federal agencies establish about 4,500 regulations per year. † According to the House Majority Whip's House calendar for 2004, there were approximately 100 days of scheduled votes on the House floor.‡ A quick calculation suggests that H.R. 931 would require Congress to tackle on average 45 rules during every day of scheduled voting, which would have the deleterious effect of grinding Congress to a halt. To some cynical observers of Congress, this may be viewed as a good thing. Others, however, would point to the fact that Congress has enough trouble passing thirteen appropriations bills each year. This proposal also could shut down much of the Executive Branch, automatically blocking its actions until a time (if and when) Congress acts.

There is no demonstrated need for H.R. 931.
The Congressional Review Act (CRA), codified at 5 U.S.C. Sections 801– 808, already requires all agencies promulgating a covered rule to submit the rule to Congress and the Comptroller General before such rules can take effect, and generally gives Congress 60 days to disapprove of major rules before they take effect. According to a recent report by the Congressional Research

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* *Impact of Regulations on U.S. Manufacturing: Hearing Before the House Subcommittee on Regulatory Affairs, Committee on Gov't* Reform, 109th Cong. (2005) (Statement of Sidney A. Shapiro, University Distinguished Chair in Law, Wake Forest University).
† *H.R. 2432, Paperwork and Regulatory Improvements Act of 2003: Hearing Before the House Comm. on Gov't Reform*, 108th Cong. 16 (2003) (hereinafter *PRA Hearing*) (Statement of John D. Graham, Administrator, Office of Info. and Regulatory Affairs, Office of Management and Budget).
‡ House Calendar available at http://majoritywhip.house.gov/calendar.asp.

Service, members of Congress have proposed a CRA disapproval resolution 37 times since the CRA took effect in 1996, and one rule has been disapproved.[§] Instead of requiring Congress to vote on all rules, as H.R. 931 requires, Congress merely needs to invoke its existing disapproval authority.

H.R. 931 would draw multiple potentially successful constitutional challenges for violating the principle of separation-of-powers.
The bill appears to run afoul of the principle of separation-of-powers by unduly interfering with the role of the Executive and Judicial Branches. In *Immigration and Naturalization Service. Chadha*, 462 U.S. 919 (1983), and *Bowsher v. Synar,* 478 U.S. 714 (1986), the Supreme Court struck down Acts of Congress because they impermissibly usurped Executive Branch functions to execute the laws. Here, H.R. 931 would in essence eliminate virtually all new Executive Branch agency rules by rendering them nugatory, instead turning them into nothing more than proposed bills that Congress would have to enact. As a result, the bill would usurp the power of the Executive Branch, preventing it from faithfully executing the laws that authorized the creation of the rules in the first place. This raises substantial balance of powers issues that are profoundly troubling.

Moreover, H.R. 931 may impermissibly usurp judicial powers. Section 7 of the bill states that regulations enacted pursuant to H.R. 931 would not be considered "agency action for the purpose of judicial review" under chapter 7 of title 5 of the Administrative Procedure Act. 5 U.S.C Section 704 of the APA requires, in part, final agency action before any judicial review is allowed. H.R. 931 could therefore be read to purport to completely eliminate the ability of individuals to seek judicial relief for any wrongs suffered due to agency action. This raises significant Constitutional questions as to whether Congress can so circumscribe judicial powers under Article III of the Constitution, and can eliminate the fundamental right of individuals to due process and to seek judicial redress for wrongs committed by their government. *See, e.g. Bartlett v Bowen*, 816 F.2d 695, 705-707 (D.C. Cir. 1987).

H.R. 931 simply fails to respect the interdependence among the branches in our unique system of governance. In the often-quoted words of Justice Jackson: "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity."[**] Moreover, it also could effectively shut down the Legislative and Executive branches' activities. Therefore, we are opposed to H.R. 931.

II. H.R. 1167, Amending the "Truth in Regulating Act of 2000"

Another piece of legislation, H.R. 1167 proposes amendments to the "Truth in Regulating Act of 2000 (TIRA)," (Pub. L. No. 106-312, 114 Stat. 1248). It would make permanent what was supposed to be a pilot project that permits Congress to request an independent evaluation from the Government Accountability Project (GAO) of an agency's cost-benefit analysis after it

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[§] Morton Rosenberg, CRS Report RL30116, *Congressional Review of Agency Rulemaking: An Update and Assessment After Nullification of OSHA's Ergonomics Standard*, July 20, 2005, p. 6.
[**] *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (concurring opinion).

publishes an "economically significant rule".[††] Despite enacting the Truth in Regulating Act, Congress has never appropriated the money necessary,[‡‡] as required under the Act, to permit GAO to conduct the pilot project.[§§] Therefore, in essence, this bill seeks to put the "pilot program" on during prime time, without having first tried it out.

H.R. 1167 would create a costly, burdensome program.
For a Congress that prides itself on streamlining government, H.R. 1167 would create a costly, burdensome program. Cost-benefit analyses, according to a study by the Congressional Budget Office (CBO), costs agencies significant time, money, and staff effort.[***] The study further states that each cost-benefit analysis varied in the amount of time it took to complete, with an average of three years and a range of six weeks to more than 12 years.[†††] The CBO found that the average cost for a cost-benefit analysis was about $570,000, with a range of $14,000 to more than $6 million per analysis.[‡‡‡] Adjusted for inflation using 2005 dollars, the average costs are about $727,000, with a range of $17,800 to more than $7.7 million per analysis.[§§§]

On top of the agency's costly and time-consuming cost-benefit analyses, and the detailed review of those analyses already conducted by the Office of Management and Budget and frequently by agencies' outside peer review committees, H.R. 1167 would require yet another duplicative expenditure of time, money, and staff effort by GAO to conduct a re-re-evaluation of the agency's cost benefit analysis. Based on information from the GAO, CBO estimated that those activities would cost taxpayers about $8 million annually.[****]

GAO does not have the resources to comply with the Truth in Regulating Act.
The GAO has stated that it lacks the capacity to comply with the Truth in Regulating Act and more troubling, cannot accept all of its current congressional requests. In a May 2004 letter to the Committee, Comptroller General Walker stated that "any expansion of GAO's scope without additional dedicated resources would pose a serious problem for us, especially in light of what will likely be increasing budgetary constraints. It would also likely serve to adversely affect our ability to provide the same level of service to the Congress in connection with our existing

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[††] P.L. No. 106-312, which H.R. 1167 is amending, defines an "economically significant rule" as "any proposed or final rule, including an interim or direct final rule, that may have an annual effect on the economy of $100,000,000 or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities.
[‡‡] Letter from David M. Walker, Comptroller General of the United States, to The Honorable Henry Waxman, Ranking Minority Member of the Committee on Government Reform, U.S. House of Representatives (May 11, 2004) (on file with the Committee on Government Reform).
[§§] Section 6(b) of the Truth in Regulating Act states that the pilot project would continue only if in each fiscal year, "a specific annual appropriation not less than $5,200,000 or the pro-rated equivalent thereof shall have been made for the pilot project."
[***] Congressional Budget Office, *Regulatory Impact Analysis: Costs at Selected Agencies and Implications for the Legislative Process*, March 1997, preface. Available at http://www.cbo.gov/ftpdocs/40xx/doc4015/1997doc04-Entire.pdf.
[†††] *Id.* at viii.
[‡‡‡] *Ibid.*
[§§§] Inflation adjustment using the Consumer Price Index inflation calculator from the Bureau of Labor Statistics, available at http://www.bls.gov.
[****] Congressional Budget Office, *Cost Estimate: H.R. 2432, Paperwork and Regulatory Improvements Act of 2004* (May 14, 2004), p. 2, available at http://www.cbo.gov/ftpdocs/54xx/doc5451/hr2432.pdf.

statutory authorities."[††††] Yet, H.R. 1167 strikes Section 5 of the TIRA, which specifically authorizes $5,200,000 to carry out the Act, without replacing it with any additional monies.

GAO has stated that TIRA should not be a permanent program.
Moreover, Comptroller General Walker stated in the same letter that, "in our view, if Congress wants TIRA to continue, we believe it should do so as a pilot project rather than as a permanent authority."[‡‡‡‡]

H.R. 1167 is duplicative of existing government functions performed by OMB and is based on a faulty assumption that existing information is not already transparent.
H.R. 1167 is further troubling because, if enacted, it would be duplicative of functions already performed by the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA). Under Executive Order 12866, OIRA must review a "significant regulatory action".[§§§§] In 2003, this amounted to review of about 500 agency rules by OIRA.[*****] The content of these reviews are readily available to Congress. H.R. 1167 would similarly require, on a permanent basis, a review of these rules by GAO. In explaining the necessity for this duplication, Section 2 of TIRA states that the purpose of the Act is, in part, "to increase the transparency of important regulatory decisions." This assumes that information already coming to Congress from OIRA and the agencies is not already transparent. This simply is not the case.

The likely purpose of H.R. 1167 is to advance the flawed concept of "regulatory caps".
In light of GAO's resistance to making TIRA permanent and the weak rationale for doing so, we must ask: why have proponents been advocating this proposal in various forms since at least 1997? Clues to its potential underlying purpose of at least some of its supporters are found in prior testimony submitted by Fred Smith, President and Founder of the Competitive Enterprise Institute, an industry-funded organization. In response to a written question from Chairman Davis on whether the GAO should have permanent staff to provide Congress with an independent evaluation of an agency's cost-benefit analysis, Mr. Smith generally agreed and began his response by stating that he supports it as movement towards "regulatory budgets."[†††††]

A regulatory budget is actually a "regulatory cap," a deeply flawed concept that limits the total costs that an agency's combined rules can impose on industry or others. The cap on rules' costs would be based solely on the costs — there would be no consideration of their benefits. Once an agency reached its cap, it would not be allowed to issue further rules, even if the benefits were far greater than the costs. It makes one wonder: if the true goal of "regulatory reform" advocates is to maximize the net benefits of rules, why are the advocates not urging that agencies' rules achieve a minimum level of aggregate net benefits?

[††††] *See* footnote 7, supra.
[‡‡‡‡] *Ibid.*
[§§§§] Executive Order 12866 defines "significant regulatory action", in pertinent part, as "any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities . . . ." *Compare* the similarity of a "significant regulatory action" under E.O. 12866 *with* an "economically significant rule" under Section 3 of the Truth in Regulating Act of 2000 at footnote 6, *supra.*
[*****] *See* footnote 2, *supra.*
[†††††] *PRA Hearing,* p.68 (Statement of Fred Smith, President and Founder, Competitive Enterprise Institute).

Additionally, it is important to recognize that cost estimates are inherently inaccurate and generally biased upward. The estimates are based on prospective projections of regulatory costs, with no validation after the regulations have been implemented. [‡‡‡‡‡]

Moreover, those agencies that protect the environment and promote safety in the workplace and the highways are often the agencies singled out for regulatory budget pilot projects. As has been repeatedly demonstrated, corporations will act in their own short-term best interests to maximize profit. Government protections have always been and will remain necessary to protect our environment and the public health and safety from corporate negligence.

The advocates of this legislation may hope that the ability of the Administration to implement regulatory caps would be advanced by having GAO calculate the costs of rules, and thereby lay the groundwork for an agency's budget cap. OMB and the advocates of regulatory caps may use GAO's independent analysis to lend a false appearance of technical objectivity to a political decision that is designed to benefit corporate interests over the public's interest.

Therefore, we are also opposed to H.R. 1167.

III. Congressional Review Act Amendments (H.R. 576 & H.R. 3148)

H.R. 576 and H.R. 3148 both would amend the Congressional Review Act (CRA) to establish a new partisan congressional committee composed of 12 Members from both the House and Senate to be appointed by the majority leader of the Senate and the Speaker of the House of Representatives. Before an agency rule could take effect, an agency must submit to the joint committee a copy of the rule and a concise statement on whether it is a major rule. In addition, while the precise contours of the committee's powers envisioned by the bills are not entirely clear, apparently the joint committee would be empowered to adopt a resolution of disapproval, which could trigger floor or committee action in the requisite body.

Raises Bicameral Legislature Constitutional Questions

We are concerned that vesting such extraordinary authority in a joint committee—whereby it is possible that a relative handful of members of one Congressional body (e.g. the Senate) could effectively force action in the other body (e.g. the House), raises substantial Constitutional questions. Article I mandates that there be separate bicameral legislative chambers, the House and the Senate, which retain separate powers. As the Supreme Court's decision in *Immigration and Naturalization Service v. Chadha, supra,* highlights, statutes must be very careful not to tread on the bicameral legislative plan established by the framers.

[‡‡‡‡‡] *How to Improve Regulatory Accounting: Costs, Benefits, and Impacts of Federal Regulations – Part* II, 108th Cong. 89 (2004) (Statement of Joan Claybrook, President Public Citizen). *See also PRA Hearing*, pp. 106-113 (Statement of Lisa Heinzerling, Professor of Law at the Georgetown University Law Center, Vice President of Center for Progressive Reform), and Thomas O. McGarity & Ruth Ruttenbert, *Counting the Cost of Health, Safety and Environmental Regulation*, 80 Tex. L. Rev. 1997 (2002).

H.R. 576 and H.R. 3148 create an Über-Committee whose oversight jurisdiction would surpass all other standing congressional committees combined.
In carrying out the duties under the CRA, each bill grants the committees broad authority to hold hearings, administer oaths, and report to Congress on matters within their jurisdiction. The exact scope of this jurisdiction is not expressly outlined, but is clearly extraordinarily expansive, because given that Section 804(3) of the CRA adopts the definition of "rule" found in 5 U.S.C. 551(4) of the APA, the joint committee would have the express authority to conduct oversight on *every substantive agency regulation.*[§§§§§] This creates an Über-Committee whose oversight jurisdiction would surpass all other standing committees in the House and Senate combined. Congress should pause and think long and hard before enacting anything like H.R. 576 and H.R. 3148. Congress should recognize the staggering breadth of the new joint committee's jurisdiction, its duplication of and intrusion into the oversight authorities of this committee and virtually every other standing committee in Congress, and its potential to undermine and override the jurisdiction of the current standing committees.

There is no demonstrated need for overhauling the CRA.
Despite these serious failings, there is no demonstrated need to overhaul the CRA. Congress generally has chosen to exercise its authority under the CRA only sparingly—indeed, according to CRS, individual members of Congress have proposed disapproval of agency rules only 37 times, when about 39,400 rules have been adopted since the CRA was enacted.[******] It is unclear why the existing authorizing committees need to be supplanted or duplicated by another committee.

The CRA has been used to consistently attack public health, safety, and environmental protections.
Moreover, despite some good applications of the CRA, it has often been used to attack public health, safety, and environmental protections – 11 of the 37 resolutions – based on the recent study by the CRS.[††††††] Of those 37 resolutions, one nullified OSHA's ergonomics safety standards, which were strongly opposed by business interests.

There are also several specific examples of how the CRA was used to attack environmental protections. For example, in January 2001, the Department of Energy (DOE) issued appliance efficiency standards for air conditioners, clothes washers, and water heaters. Rep. Joe Knollenberg sponsored two joint resolutions of disapproval to block the standards. Not only were these standards the product of years of debate, they are critical to solving the energy shortages the nation now faces. The new appliance efficiency standards promise tremendous environmental benefits, as well as consumer savings. Consumers and business are projected to

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[§§§§§] Section 804(3) adopts the definition of "rule" found at 5 U.S.C. 551(4), which provides that the term rule "means the whole or part of an agency statement of general . . . applicability and future effect designed to implement, interpret, or prescribe law or policy." 804(3) expressly excludes any rule of particular applicability; or any rule of relating to agency management or personnel; or any rule of agency organization or practice that does not substantially affect the rights or obligations of non-agency parties. The legislative history of Section 551(4), however, indicates that the term rule is to be construed broadly to encompass "virtually every statement an agency may make." *See Avoyelles Sportsmen's League, Inc., v. Marsh*, 715 F.2d 897 (5th Cir. 1983).
[******] *See* footnote 4, *supra*, at pp. 7 – 12.
[††††††] *See* footnote 4, *supra*, at pp. 7 – 12.

save over $22 billion during 2004-2030 due to the new standards.[‡‡‡‡‡‡] The resolutions of disapproval were not adopted.

This Committee should consider providing recommendations to Congress on abolishing obsolete corporate subsidies to increase our country's competitiveness.
It is important to note that contrary to the title of this hearing, there is no substantial evidence that rules harm U.S. competitiveness. The above rules are examples of types of programs that will increase our competitiveness, spurring U.S. corporations to develop new technologies to retain our competitive advantage in the global marketplace. However, our government often awards disproportionate public favors in the form of corporate subsidies to certain industries that have little or nothing to do with competitiveness — and even undermine it. For example, the oil and gas industry is often the beneficiary of huge subsidies, which inevitably do injury to clean energy competitors who do not receive the same handouts.

For this reason, if this committee is truly interested in fairness and competitiveness, perhaps it should explore proposals for creating a temporary commission (with no power to force action by either chamber or to supersede authorities granted to standing committees), to provide recommendations on abolishing obsolete, anticompetitive subsidies that force taxpayers to support subsidies that no longer serve the public interest. A bill to this effect is already before your committee, H.R. 974. We encourage the committee to take the courageous step of giving this or a similar bill a fair hearing in the coming months, especially in light of the fact that House and Senate conferees are currently negotiating tax breaks for the oil and gas industry in the energy bill.

Let me close by saying that we appreciate the opportunity to share my thoughts with you. We stand ready at any time to help the members of the committee think through how to ensure our country remains competitive without resorting to legislative gimmicks, which if used in a cynical manner, could attack and seriously weaken our country's landmark environmental, health, and safety protections.

Thank you.

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‡‡‡‡‡‡ *A Rush to Regulate – The Congressional Review Act and Recent Federal Regulations Before the Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs of the Committee on Government Reform*, 107th Cong. (2001) (Statement of Sharon Buccino, senior attorney, Natural Resources Defense Council).

Ms. MILLER. Thank you all very much.

It is interesting to listen to your various recommendations here. Mr. Lewis is saying that more congressional oversight is the short answer to the question, and Mr. Olson mentioning H.R. 931, J.D. Hayworth's bill, which I think is a very interesting bill, but if you think about 4,000 regulations a year, perhaps we do not have the time to review every one of them but perhaps it could be fine tuned with some specific criteria or something.

I guess my question is, I will just throw this out generally to the panelists, how can we actually achieve the proper balance as Members of Congress for congressional oversight, that we do have the proper oversight initiatives here at the same time that we are not wanting to tie the agencies' hands completely as well?

Mr. LEWIS. There are a variety of ways of streamlining or limiting congressional review, even under Representative Hayworth's proposal. It was mentioned earlier that there are something like 135 economically significant rules under various stages of development in the most recent unified agenda of the Federal Government.

I do not know exactly how many of those are completed regulatory actions, but I do know how many were completed actions in the 2003 edition when there were 127 economically significant rules at the pre-rule, proposed rule, final rule completed, and long-term stages. That was 22. So we are talking about two dozen economically significant rules a year probably that are finalized and go into effect that year.

I think it is unquestionable that Congress could find the time to review and actually vote on two dozen, maybe even three dozen economically significant rules, especially when you consider how much time is devoted to matters of lesser importance, as Congressman Lynch and others have pointed out.

I also think that even though I am not quite clear about all the details of Congressman Ney's proposal, that the basic idea is entirely sound. Everybody knows who works here certainly, but even people who do not, who have just taken college political science, that the work of Congress is done by committees. And, so if something is really important and is to get done by Congress, it has to have an institutional basis in a committee structure, in a committee system.

And we also know when you have a committee, then you have professional staff and they develop institutional memories, and for these staff to justify their existence that committee really has to take action. And so it is not surprising that only 37 resolutions of disapproval have been introduced. As Congressman Lynch said, if it is everybody's responsibility, it is nobody's.

But if you give a specific committee an assignment to monitor rules for the purpose of developing resolutions of disapproval, I think we will find that we get a lot more than 37 over time.

Mr. COPELAND. One thought. This balance is a tricky thing trying to determine what controls need to be placed on regulatory agencies without hindering them so much that they cannot really act. But I do not think hardly anyone would expect agencies to put out rules without issuing some clear guidance as to how they are supposed to be implemented.

And Section 212 of the Small Business Regulatory Enforcement Fairness Act, which required compliance guides but allowed agencies to opt out of that process whenever they determined that the rules do not have a "significant impact on small entities," points out the problem or part of the problem, in that if an agency has that much discretion, then it is basically up to them to decide what they get to do or what they have to do.

There is currently a bill before the House, Congressman Manzullo's bill, that would require the SBA Office of Advocacy to define that term or at least come up with rules to define that term. That would at least set some parameters so that if it is more than a certain amount, 1,000 small businesses affected to the tune of $5,000 apiece, above that is automatically going to be considered a significant economic impact on a substantial number. So there needs to be some clarity with regard to that, and there are opportunities legislatively to do that.

On the Senate side, Senator Snow has a bill that would require agencies when they issue a compliance guide to issue it contemporaneous at least with the effective date of the rule. So that you cannot have instances where compliance guides are issued years after rules have already taken effect. That, to me, makes some sense. So there are some tweaks to the existing reforms that can also be made.

Mr. OLSON. I would like to just add one point, which is, two of the bills that we have been talking about that create this joint committee, I do have concerns both about the impact of that on committee jurisdiction, the Energy and Commerce and other committees, what the implications of that would be.

It would seem that where you have committee staff and Members that already have developed expertise, the idea of sending these to the committee of jurisdiction makes a lot more sense. We have concerns that if it is difficult for the committee of jurisdiction to develop the expertise to review a rule, how can one committee review all the regulations of all the agencies. I think it becomes very difficult. So, perhaps some solution is to involve the committees of jurisdiction in making those determinations.

I think also the committee that has been proposed has a 7–5 majority-minority split, which is unlike the Ohio one as I understand it. In addition, there are issues about bicameral authority. For example, a majority of Senators could force something to be done in the House through a vote of this joint committee, which I think raises substantial Constitutional questions.

Mr. MIHM. What you are hearing, ma'am, I think is that there is a series of initiatives Congress could take that basically fall out along a continuum; at one end, some of the legislative proposals that you have heard this morning, which obviously will need some debate and careful consideration, but at the other end there are some issues or some steps that Congress could take relatively quickly, and I do not want to go too far and imply that they would be without debate or smooth sailing, but where there is a greater degree of consensus on many of the issues, a couple of things that Curtis mentioned.

In addition, we had a forum at GAO several months ago in which we pulled together a wide array of stakeholders on regulatory re-

form issues looking at the unfunded mandates. One of the key issues that came out of that was just the opportunities for better definitions and better clarity about what we are looking for and what would be an unfunded mandate and not an unfunded mandate.

Again, it is not at the end of the day as though everyone agreed on everything, but there was a general consensus of we can get people together, we can continue the conversation, we might be able to make some real substantive steps. And so my point is, there is a whole series of very important but still smaller baby steps that Congress could take before you have to grapple with some of the more difficult issues.

Ms. MILLER. All right. Thank you very much.

Representative Lynch.

Mr. LYNCH. Thank you, Madam Chair. I want to thank you each for participating and for your help. I have been reading a lot of your stuff recently, especially of Mr. Copeland. Very, very helpful. It has been very educational on my part; I am a new member of this committee.

There are 1,000 ways that we could go here. But Mr. Mihm, you described this continuum where we can actually be more specific with our legislation, to begin with, which would provide more specific guidance to agencies so they would not wander afield. And then we have a couple of opportunities I think during the proposed draft public comment process, and then again in the final rule draft we have another opportunity. Then the Congressional Review Act gives us an opportunity for this resolution of disapproval, if you will, which is cumbersome and it is not anybody's central job to review it. But in back of all that, the assessment that we are making of each of these regulations, good or bad.

Mr. Lewis, maybe you could speak to Mr. Olson's point about how we fall into a pattern of talking about regulations solely as a burden. I am an ironworker, spent 20 years in the business. We have regulations now that were not in place when I was ironworking, where they actually have nets so people do not fall to their deaths.

When I was ironworking, we had the dubious distinction of having more people killed and injured on the job than any other industry in the United States. We were in this bizarre, macabre competition with coal miners who would die years later of black lung or collectively in cave-ins back in the day; ironworkers died one at a time, but continually.

And then they came up with regulations that required safety belts, hard hats, nets that have a cost. They have a cost. But if you look at the productivity of ironworkers, it has gone straight up since I left. Hopefully, there is no cause and effect of that. [Laughter.]

But there is a benefit to some of this regulation. And so to just sweep it all aside, as Mr. Olson has articulated, I think is wrong and ignores the benefit that we gain from some of these regulations.

And I was fascinated by your proposal, Mr. Lewis, to open up competition to this analyses that we have going on, there is a certain monopoly there among OMB and GAO, whatever, and to open

that up. Now we open that up, but we also have industry out there, people that want to tell us that smoking is actually good for you, you know, the tobacco industry and all that, but you do have industries out there that would want to sell you a bad bill of goods, and they would sponsor research. Maybe we ought to take a look at that in a separate hearing at some point.

But what would be part of that analysis? Would we invite this competition and have people try to quantify the costs and benefits of the regulation in a real way, in a meaningful way? Because we are sort of hung up on that.

Mr. LEWIS. Yes, I quite agree with you that regulations have benefits, and included among those is saving lives. Sometimes regulations have unintended consequences, and they actually increase fatalities and casualties. Fuel economy standards, for example, of automobiles has resulted in the downsizing of cars, and NHTSA in several studies has determined that, yes, that contributes to highway fatalities.

But of course, the purpose of health and safety regulation is to make people healthier and safer, and the purpose of environmental regulation is to make the environment cleaner, and I am in no way disputing that.

The competition proposal that I was discussing would be one in which people would be able to submit their own cost and benefit estimates and have it go toe-to-toe with an agency's estimate. It would not be quite a level playing field because in this particular formulation of this proposal, and there might be other ideas, like putting it in front of a Blue Ribbon panel or something, it would be OMB that would be one of the judges, at least.

I think it would be great to have GAO also judging and making its own independent determination of who the winner is, but OMB definitely I think has a bias in favor of the agencies that are all part of the same administrative team. But, see, you could also do this with independent agency rulemakings, and maybe OMB would be a little bit more impartial there.

The idea would be to allow really a public debate and conversation on an agency analysis that would be excited by a contest. There is nothing, as some people have said, there is nothing like a good brawl to draw a crowd. And why is it Americans love sports? Why is it that so many millions of people watch football? Because Americans love contests and contests bring out the best in people.

Mr. LYNCH. If I may interject, though. Using that same analogy, it is the George Steinbrenners who have the most money that buy the best players that win. And I am just concerned that the greatest incentive would be to industry—the coal industry, the automobile industry, the tobacco industry—to weigh in against GAO or OMB, and so the public, you know, Joe Schmoe and Mary Schmoe, who do not have an advocate on their side, their interest is subverted or ignored completely.

Mr. LEWIS. Well I think they are lost in the shuffle today. I think the difference here is that you would have State and local governments weighing in, they also have their regulatory experts, and you would have small business associations weighing in. It would be a

public contest and OMB would finally have to judge whose analysis is best.

See, right now, Mr. Olson cited John Graham's testimony to the effect that the benefits swamp the costs. But if you read the fine print in OMB's 2005 Draft Report, and in fact all of their reports under the Regulatory Right to Know Act going back over the years, they do not do anything like an audit of the agencies' estimates, they just compile them. And so what they are taking is the agencies' estimates, which, let us face it, have to be to some extent self-serving because a cost-benefit analysis is a justification for actions the agency wants to take, and they just aggregate them.

So here, you know, you would actually get OMB not just reporting what the agency said were the cost and benefits of a rule, but OMB having to pick that estimate versus the estimates that could be submitted by a small business group, by a State government regulatory expert, or an association of State governments. I just think that this kind of more open marketplace for regulatory analysis—and we would not be requiring the agency to accept the cost-benefit analysis of anyone else.

We are just saying let us have your expert and the other fellow's expert present your material and have judges decide. That in itself would generate a tremendous amount of oversight and interest on the part of Congress and the public and I think it could just have a healthy result overall.

Mr. LYNCH. Interesting. I do not know if anybody else wants to——

Mr. MIHM. Mr. Lynch, since GAO was mentioned in this context, I would add just a couple of seconds on this, not so much on the broad merits of what has been discussed. But our longstanding belief and Congress' belief as well has been that the appropriate role for GAO is not to be an independent judge in these types of situations, but rather this would be an executive function to be judging, to the extent you wanted to go down that road, among competing cost-benefit analyses.

The more appropriate role, if Congress would want GAO to do that, would be then to kind of weigh in on the merits of the debate after it took place rather than to be an active party in that debate. It also would have a series of resource implications that, depending on if you want to advance this, that we would like to engage in that discussion with you as well.

Mr. OLSON. Could I just add briefly. It is important to keep in mind that, according to a CBO review, just doing one of these cost-benefit analyses costs on average about $570,000 and can cost several million. I mean, Joe Schmoe and Mary Schmoe are not going to pay that kind of money to run one of these things.

So I think one of these competitions that has been suggested would end up being just completely disproportionate, that the industry that is well-funded would come in with a higher rack of economists, attack the agency—which they already do, there already is an opportunity for them to comment—and try to shoot down the agency and bog it down.

The other point I would make is that OMB absolutely does do reviews of the agency's regulatory impact analyses and often comments on them and says that they are no good and go back to the

drawing board. So, it is not quite accurate to say there is no OMB review of these RIAs.

And finally, I think one idea, the TIRA, the Truth in Regulating Act, that already is law, that theoretically is a pilot—it sort of reminds me, my son just got his learner's permit to start driving and——

Mr. LYNCH. My condolences. [Laughter.]

Mr. OLSON. It is like giving him the keys to a Mazaratti or something and just saying go ahead and drive. We have not test piloted this thing yet. It has never been funded. Why not sort of see whether this pilot program starts working, start looking at whether a pilot can work before we start throwing this out into a full-blown, full-time kind of an approach.

Mr. LEWIS. Could I comment?

Ms. MILLER. Mr. Lewis.

Mr. LEWIS. I think that Congresswoman Kelly's proposal is exceedingly moderate, you could describe it as tame. And I understand why she is proposing something so tame. It is because she did not get very far with something more ambitious. Nonetheless, I think it is useful to lay out the ultimate goal here, and I think the ultimate objective is to have a counterpart to the Congressional Budget Office. Congress would be at the mercy of the White House, OMB, and the executive branch if you did not have CBO to do its own assessment of taxes and spending. Regulation is, if not equal in size in terms of the overall cost on the American economy or benefit of spending programs, it is certainly quite substantial. It is a gigantic part of the overall activity of government.

I see no reason why Congress should not have its own independent institution dedicated to regulatory affairs, just the way it does to budget affairs. And that, I think, would make it a lot easier for you folks to do all kinds of oversight. And that would also, it seems to me, be the proper institution for providing an alternative judgment to OMB's judgment as to whose cost-benefit estimate is best.

Ms. MILLER. Do you have any other questions?

Mr. LYNCH. No. Mr. Copeland, I did not know if you wanted to comment.

Mr. COPELAND. I think it is an interesting concept, the layout in terms of competing economic analyses. I would point out that GAO has weighed in on agencies' economic analyses in the past; I have been part of a few of those efforts. And what those typically look at is, are the underlying data appropriate, are they sound, are the assumptions that the agencies are making in the absence of data sound, and have they considered all the available alternatives? Those are reasonable questions that can be asked.

And we did in the context of the TRI lead rule that I mentioned a while ago, where we found that EPA in their economic analysis said that the rule would affect 60 different SIC codes, they only had data on 30, so they left the other 30 completely away. And we said even making some modest assumptions about how many small businesses would be affected there, the number of small businesses could be much larger than what EPA had estimated. But on the other hand, we said EPA has the complete right to certify under the Regulatory Flexibility Act to saying that the rule would not

have a significant economic impact because Congress has never defined that term.

Mr. LYNCH. All right. Fair enough. Thank you, Madam Chair.

Ms. MILLER. Thank you. Again, we want to thank all the witnesses. Your testimony was certainly fascinating, particularly as you were talking about some of the various approaches to the cost-benefit analysis of these regulatory kinds of things.

I think it was last week, at our last hearing at any rate, we picked one particular issue to look at, something that OSHA is looking at right now and promulgating a rule for, and this is hexavalent chromium. And it was interesting. They are going from a standard that we have had for quite a few decades I suppose of 50 milligrams per billion, I suppose that is the way they measure it, down to 1. We looked at all of our various foreign competitors and what their standards were, etc.

But the cost-benefit analysis by OSHA was I think $200 million, and the industry's was billions and billions and billions. So it is a balancing act I think for Members of Congress just to try to understand it and try to do our very best job here.

But we certainly appreciate all of your time. You are gracious to come here and give of your time and your testimony as well. We appreciate that very much. Thank you.

With that, we will adjourn the meeting.

[Whereupon, at 12:20 p.m., the committee was adjourned.]

[Additional information submitted for the hearing record follows:]

August 4, 2005

The Honorable Candice S. Miller
Subcommittee on Regulatory Affairs
B-373 B Rayburn House Office Building
Washington, D.C. 20515

Dear Chairwoman Miller:

Thank you again for giving me the opportunity to present testimony on congressional regulatory reform initiatives.

After further reflection, I believe I can state more clearly the key requisites of successful regulatory reform. Recent history suggests that reformers should concentrate on initiatives that: (1) visibly embody good-government principles, (2) enhance competition and checks and balances in the regulatory process, and (3) credibly advance the interests of small business and state and local governments. A brief explanation follows.

(1) Choose initiatives that visibly embody good government principles. Reformers can prevail only if they can convincingly lay claim to the moral high ground. One reason the Contract with America's cost-benefit and risk-assessment provisions went down in flames is that they could not easily be explained or defended in terms of generally recognized good-government principles. Indeed, opponents plausibly argued that the Contract's proposals would cause "paralysis by analysis" and, thus, block, delay, or weaken critical public protections.

Today's reformers should highlight how the regulatory status quo undermines good government. Regulatory costs, unlike tax and spending burdens, are largely hidden from public view. Regulatory decisions, unlike tax and spending decisions, are made by bureaucrats not accountable to citizens at the ballot box. Agencies, unlike the entities they regulate, face little competition and no market test for their services. Reforms designed to make the regulatory process more transparent, accountable, and competitive are more likely to gain broad public acceptance than those attempting to impose new analytic requirements on agency actions.

Opponents may try to deny that the current system conceals costs, sunders power from responsibility, or monopolizes decision making in the hands of unaccountable

bureaucrats; but that's okay. Public debate on these matters would in itself enhance the prospects for reform.

(2) Emphasize reforms that enhance competition and checks and balances. Rules of rulemaking are necessary, but as my testimony discussed, agencies are artful dodgers and OMB does not always want to constrain them. In the past, reformers mainly relied on what James Madison called "parchment barriers," with generally disappointing results. Today's reformers should pursue strategies enabling agency to check agency, Congress to check and balance both OMB and the agencies, and outside experts to compete for public approbation with agency experts.

Perhaps the most successful reform of recent years is President Bush's Executive Order 13272, "Proper Consideration of Small Entities in Rulemaking," which creates a significant role for SBA's Office of Advocacy in rulemaking. E.O. 13272 enables Advocacy in some measure to check and balance the rulemaking agencies, providing partial relief to the monopoly they otherwise exercise over regulatory analysis and deliberation. All the bills sponsored by the congressional witnesses aim to expand Congress's role in regulatory decisions. That is the right goal.

(3) Champion reforms that credibly advance the interests of small business and state and local governments. Influential constituencies must support regulatory reform, or it will not happen. But just having influential supporters is not sufficient. The supporters themselves must enjoy the respect and trust of the public at large. Rightly or wrongly, in public opinion, big business has almost no moral standing on regulatory issues. Indeed, corporate lobbying on behalf of the Contract's cost-benefit and risk-assessment proposals arguably proved to be a net political liability.

In contrast, public opinion is generally favorable to small business and state and local governments. Thus, it was no accident that, although reformers in the 104th Congress failed to enact the Contract's cost-benefit and risk-assessment criteria, a top priority of big business, they did enact SBREFA and UMRA.

Implications

As noted, the bills considered by the Subcommittee all aim to enhance Congress's responsibility for regulatory decisions. Their good-government bona fides are clear and easily explained. Moreover, any reform that increases Congress's role in rulemaking must also benefit small business and state and local governments. Why? Small business and state governments are better represented in Congress than they are in the federal regulatory bureaucracy. The more responsibility Congress takes for regulation, the more incentive Congress has to ensure agency compliance with SBREFA and UMRA.

Economist Richard Belzer's proposal to open the market for regulatory analysis is another good-government reform that would advance small business and state government interests. Under Belzer's plan, Congress would require OMB and GAO to hold contests and judge between competing cost-benefit assessments of selected major

rules. Competition would spur the agencies to improve their product, and the contests would attract media attention and public scrutiny, contributing to a more informed and transparent process. Further, regulatory experts from small business associations and state and local governments might actually win from time to time, making it tougher for agencies to ignore their concerns.

Consider how such a regime might have affected the debate over EPA's Total Maximum Daily Load (TMDL) Clean Water Act rule. EPA estimated the rule would cost state and local governments no more than $25 million annually. The Association of State and Interstate Water Pollution Control Administrators (ASIWPCA) estimated it would cost between $670 million and $1.2 billion annually. These estimates are more than an order of magnitude apart. Which estimate should Congress and the public trust? Nothing in the current process allows ASIWPCA's estimate to serve as a reality check on EPA's, or vice versa. A contest open to all experts, with OMB and GAO each required separately to pick a winner and explain its reasons, would at least have given the public and policymakers some basis for deciding whose estimate was closer to the truth.

A competitive market for regulatory analysis would have the added benefit of discouraging distortion and exaggeration, whether by agencies or other stakeholders. Under the status quo, EPA has nothing to lose by grossly understating the costs of the TMDL rule, nor does ASIWPCA have anything to lose by grossly overstating the costs. But in a contest, anyone proffering extreme estimates based on poor data, unsound methods, or unrealistic assumptions is likely to lose, jeopardizing his credibility as a regulatory expert. Thus, competition would spur both agency and non-agency experts to produce better analyses. Better analyses should then lead to better decisions.

I hope the foregoing comments clarify certain key points of my testimony. If Subcommittee rules permit, I would be grateful to you for including this letter in the hearing record.

Sincerely,

Marlo Lewis
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1001 Connecticut Ave. N.W., Suite 1250
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CC: The Honorable Stephen F. Lynch (RM)
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