Hearing before the
U.S. House of Representatives
Committee on the Judiciary

H.R. 3010: THE "REGULATORY ACCOUNTABILITY ACT OF 2011"

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I am pleased to have been asked to testify before the Committee on the "Regulatory Accountability Act of 2011." I have previously testified before this committee on matters of administrative law, including the reauthorization of the Administrative Conference of the United States (ACUS).

At the ACUS hearing seven years ago, I testified that "the U.S. administrative law system, I believe, is the best in the world. It is the most transparent, the fairest and the most economically productive." I still believe that. But as I went on to say at that hearing, our administrative law system has retained its prized status only because of the government's commitment to maintaining and improving the system over time.

"The Administrative Procedure Act," I said then, "is unrecognizable in the sense of its original language. It has been largely rewritten, not in derogation of congressional intent, but to flesh out what the words mean." Or, to adapt Justice Holmes's famous words, the life of administrative law has been both logic and experience.

The bill before this committee, the "Regulatory Accountability Act of 2011," is a welcome next step in the continued improvement of administrative law. The Act applies the lessons of both logic and experience to solve some of the stark problems raised by the regulatory state's sudden, exponential new growth. On matters of public finance, energy and the environment, telecommunications, and health care, regulatory agencies are taking broadly worded statutory grants of power and applying them in ways that threaten to undermine America's competitive standing in the world, and American liberty at home.

Against that backdrop, the Act has many provisions that I welcome, including new formal-hearing requirements for major rules and high-impact rules, and an ongoing duty to revisit previously promulgated major rules and high-impact rules. But I would like to focus my testimony today on two subjects: First, and most importantly, the Act codifies cost-benefit requirements that have governed the Executive agencies for three decades, but which have not governed "independent" agencies, such as the Commodities Futures Trading Commission (CFTC). And second, the Act prudently reinforces the courts' important oversight role through judicial review.

Cost-Benefit Analysis and the Independent Agencies

Since President Reagan signed Executive Order 12291, and continuing through its successors, including Executive Order 12866, the President has required Executive agencies to subject newly proposed regulations to cost-benefit analysis, under the guidance of the Office of Information and Regulatory Affairs (OIRA).

That centralized review has substantially improved the regulatory process, promoting efficiency while simultaneously ensuring democratic accountability.

Those Executive Orders did not reach the "independent" agencies, however; instead, the Orders exempted those agencies from their coverage. But as those "independent" agencies—the CFTC, NLRB, and Federal Reserve, for example—have come to exert exponentially greater weight on the economy, their exemption has become utterly untenable.

Regardless of the extent to which "independent" agencies are subject to presidential control, Congress *clearly* controls them through its legislative power, and it may subject those agencies to procedural requirements—such as cost-benefit analysis and the opportunity for formal on-the-record hearings—and other forms of Administration oversight and judicial review.

And that is what the Committee proposes to do here. By incorporating the provisions of the Regulatory Accountability Act of 2011 into the overarching structure of the Administrative Procedure Act—which does *not* exempt independent agencies—Congress will commit the independent agencies to OIRA guidance and oversight, including the discipline of cost-benefit analysis and alternatives analysis.

To illustrate the critical importance of this improved oversight, let me offer three recent examples of "independent" agency regulatory efforts that would be improved by OIRA oversight, cost-benefit analysis, and alternatives analysis.

1. Financial Regulation

The Dodd-Frank Wall Street Reform and Consumer Protection Act, passed just last year, created an astonishing plethora of rulemaking requirements by a variety of agencies. According to the Davis Polk law firm's widely read legislative analysis, Dodd-Frank will require at least two hundred and forty-three rulemakings. The vast majority of those rules will be issued by "independent" agencies: the CFTC, SEC, and Federal Reserve, and the newly created Financial Stability Oversight Council and Consumer Financial Protection Bureau.

So far, the result has not been encouraging; in fact, it is cause for serious concern. The CFTC's Inspector General issued a report on April 15, 2011, detailing the flaws that have pervaded the CFTC's proposal of derivatives rules. Most significantly, the IG found that the CFTC's cost-benefit analysis for the new rules was directed not by economists, but by lawyers: "it is clear that the Commission staff viewed [cost-benefit analysis] to constitute a legal issue more than an economic one, and the views of the Office of General Counsel therefore trumped those expressed by the Office of Chief Economist." The Regulatory Accountability Act, by contrast, would commit economic analysis to the economists. Better still, where the CFTC treated cost-benefit analysis as a "caboose," the Regulatory Accountability Act places it firmly near the front of the procedural train, in the required notice of proposed rulemaking.

The Federal Reserve's own regulatory work under Dodd-Frank raises similar red flags. Last month, JP Morgan Chase's CEO, Jamie Dimon, publicly

questioned Fed Chairman Bernanke whether the myriad Dodd-Frank regulatory initiatives would together do more harm than good. Chairman Bernanke answered, "nobody's looked at it in all detail," and that only after imposing these onerous new regulations would they "figure out where the cost exceeds the benefit and … make the appropriate adjustments." Chairman Bernanke's reasoning puts the cart before the horse—or, to borrow the CFTC's terms, the caboose before the locomotive. Regulators should ascertain the costs and benefits of their regulations *before* deciding whether to impose those regulations on American people and industry, as the Regulatory Accountability Act's proposed framework recognizes.

Even more worrisome, in those same comments Chairman Bernanke disclaimed even the Fed's ability to calculate whether the cumulative effect of new regulations would have a positive or negative impact on credit: "You know, it's just too complicated. We don't really have quantitative tools to do that."

Those are unsatisfactory answers, especially when the apparent cost of new regulations—in terms of both compliance and substantive effect—may be so great. No one argues that cost-benefit questions can always be resolved to the nearest dollar, but in all cases the rigor of cost-benefit review must at least ascertain generally whether regulations do more harm than good. This is particularly important in cases of landmark regulatory reform, which overturns many long-settled arrangements and imposes new burdens on people and businesses. Our independent regulatory agencies can and must do better, and the reforms proposed in this Act will help to ensure that they do.

2. Telecommunications Policy

As the Nation's dependence upon communications technology and the Internet increases, so does the FCC's role in the Nation's economy. Most significantly, a majority of FCC commissioners have committed to establishing "net neutrality" rules governing current and future Internet infrastructure, culminating with the promulgation of net neutrality rules in December 2010. That policy is surrounded by uncertainty, both with respect to whether the policy is lawful (in light of the D.C. Circuit's decision last year in *Comcast v. FCC*), and with respect to whether those rules are justified as a matter of policy. While I would not currently offer conclusions on either of those points, I will note that the Commissioners are deeply divided on the question of whether the net neutrality policy's costs outweigh its benefits. The FCC's majority asserts that "the costs associated with these open Internet rules are likely small," but the dissenting commissioners urge that the policy will result in "less investment," "less innovation," "increased business costs," "increased prices for consumers," and "jobs lost." These are precisely the questions that should be—and, under the proposed Act, would be—resolved through rigorous cost-benefit analysis undertaken under OIRA oversight.

3. Energy and Environmental Policy

Let me end with one more brief example. The Nation's energy and environmental policies implicate not just one agency, but many. Spreading responsibility for these issues across many agencies is an invitation for substantial inefficiency, perhaps even cases of agencies working at cross-purposes. And so

inter-agency coordination is critically important. While the agencies with greatest influence over U.S. energy policy probably are the Department of Energy and the Environmental Protection Agency (EPA), three other important regulatory bodies—the Federal Energy Regulatory Commission (FERC), the Nuclear Regulatory Commission (NRC), and (because of its derivatives jurisdiction) the CFTC—are "independent" agencies, and thus exempt from the current OIRA review process. Going forward, the FERC's jurisdiction over natural gas pipelines will help to shape the Nation's development of newly abundant natural gas supplies; the NRC, meanwhile, largely controls the future of our electric power supply through its regulation of nuclear power generators, and the proposed Yucca Mountain site. The proposed Act would help to ensure that those agencies' rules promote the public interest in a coordinated procedure that includes the Energy Department and EPA.

Judicial Review

Let me note one other salutary feature of the Act: it strengthens judicial review of agency actions on questions of regulatory interpretation, factual issues, and cost-benefit analysis, at least in cases where the agency's own process fails to satisfy the Act's heightened requirements. Judicial review of agency action requires a delicate balance—the applicable standards of review are deferential, but those standards must be firmly enforced. The Act strikes that balance well.

And the courts are clearly able to maintain that balance of deference and critical scrutiny, as the D.C. Circuit demonstrated most recently deciding the case of *Business Roundtable v. SEC*. There, the court struck down the SEC's "proxy

access rule" upon narrow but firm review of the SEC's failure to satisfy an SEC-specific statute requiring the agency to consider costs and benefits. As the court explained in that case:

> We agree with the petitioners and hold the Commission acted arbitrarily and capriciously for having failed once again . . . adequately to assess the economic effects of a new rule. Here the Commission inconsistently and opportunistically framed the costs and benefits of the rule; failed adequately to quantify the certain costs or to explain why those costs could not be quantified; neglected to support its predictive judgments; contradicted itself; and failed to respond to substantial problems raised by commenters.

The SEC's failings in that case exemplify some of the regulatory failings that the Regulatory Accountability Act would work to prevent; the court's analysis exemplifies the well-tailored solution that courts would provide under the Act.

I would stress, however, that Congress must not dilute those generally applicable standards of judicial review by enacting separate statutes that tighten the scope of judicial review and thus effectively immunize certain agency decisions. The best recent example of this troubling trend is the Dodd-Frank Act, which prohibits the Supreme Court and other federal courts from considering, among other things, whether the Treasury Secretary's "resolution determination" (*i.e.*, forced liquidation) of a financial company was lawful; instead, the courts may only review whether his factual determinations and analysis was reasonable.

After I criticized Dodd-Frank's troubling features in a *Washington Post* op-ed last December, the Treasury Department's General Counsel replied in a letter to the editor, asserting that Dodd-Frank "explicitly provides for judicial review" of such draconian agency determinations, but neglecting to admit that judicial review

would be strictly limited in terms of both scope and time, thus nullifying the protections that judicial review ordinarily provides.

Congress should not insulate those types of agency actions from judicial review. The Regulatory Accountability Act is a welcome sign that this Committee values the courts' oversight role, and I hope that it signals Congress's continued commitment going forward.

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The White House recently claimed that "the annual cost of regulations has not increased during the Obama administration"; that the last two years of President Bush's administration "imposed far higher regulatory costs than did the Obama administration in its first two years"; and that "there has been no increase in rulemaking in [the Obama] administration." Those are very broad—and, to put it gently, counterintuitive—claims. Only by requiring the federal agencies to calculate the costs and benefits of their regulations, and then subjecting those projections to the scrutiny of public comment, can we know with greater certainty whether new regulatory initiatives, especially landmark initiatives affecting economic growth and energy infrastructure development, do more good than harm.

Again, I am grateful for the opportunity to testify in favor of the Regulatory Accountability Act of 2011. It draws on, and improves upon, the foundation laid in the Administrative Procedure Act and the Executive Orders on regulatory review.