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BEFORE THE JUDICIARY COMMITTEE  
UNITED STATES HOUSE OF REPRESENTATIVES

HEARING ON H.R. 3010, REGULATORY ACCOUNTABILTY ACT OF 2011  
OCTOBER 25, 2011

Mr. Chairman and Members of the Committee, thank you for inviting me here today to share with you my views on H.R. 3010, the Regulatory Accountability Act of 2011, which would drastically overhaul the Administrative Procedure Act (APA) and introduce several imprudent changes to the process by which agencies develop regulations.

I am the University Distinguished Professor of Law at the Wake Forest School of Law. I am also a Member Scholar and Vice-President of the Center for Progressive Reform (CPR) (<http://www.progressivereform.org/>). Founded in 2002, the Center for Progressive Reform is a 501(c)(3) nonprofit research and educational organization comprising a network of 60 scholars across the nation dedicated to protecting health, safety, and the environment through analysis and commentary.

My work on regulation and administrative law includes six books, seven book chapters, and over fifty articles (as author or coauthor). My last book, published in 2010 by the University of Chicago Press, addressed administrative performance and accountability. I have served as consultant to government agencies and have testified before Congress previously on regulatory subjects.

## I. INTRODUCTION

When agencies regulate, they are implementing the protections that Congress required in their statutory mandates. The long history of regulation—airbags, unleaded gasoline, cleaner air and water, food safety protections, and more—demonstrates that when agencies fulfill their legislative mandates, it saves lives, prevents serious injuries, and protects the economic livelihood of millions of Americans. By comparison, when agencies fail to fulfill these mandates, immense harm can result. It was too little regulation and enforcement that led to the BP Oil Spill, the Upper Big Branch Mine Disaster, and the almost yearly outbreaks of serious food poisoning that have killed many and injured thousands more.

While it is important that agencies protect the public, those protections must be achieved in an accountable and fair manner. The role of administrative procedures is to ensure sufficient accountability and fairness. But it is possible to have too much of a good thing. While it is always possible to add more procedures, we must also consider the impact of doing so on an agency's capacity to protect the public.<sup>1</sup> Administrative procedure must "comport with efficiency while also ensuring fairness and negating the fear of unchecked power."<sup>2</sup> We must achieve an appropriate balance between accountability, fairness, and the capacity of agencies to complete their statutory mission. In the design of administrative procedure, "[i]t

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<sup>1</sup> See Sidney A. Shapiro, *Paul Verkuil and Pragmatic Adjustment in Government*, 32 CARDOZO L. REV. 2459, 2459 (2011).

<sup>2</sup> Paul R. Verkuil, *The Ombudsman and the Limits of the Adversarial System*, 75 COLUM. L. REV. 845, 855 (1975).

is equally important . . . to provide mechanisms that will not delay or frustrate substantive regulatory programs.”<sup>3</sup>

Because it is important that we not frustrate the ability of agencies to achieve their statutory missions to achieve marginal benefits in accountability and fairness, I have several problems with H.R. 3010:

- Most fundamentally, H.R. 3010 would block or dilute the critical safeguards on which all Americans depend. The available evidence demonstrates unequivocally that regulations have benefited the United States greatly, while the failure to regulate has cost us dearly.
- The regulatory system is already too ossified, and H.R. 3010 would only exacerbate this problem. It currently takes four to eight years for an agency to promulgate and enforce most significant rules, and the proposed procedures would likely add another two to three years to the process. Under H.R. 3010, the longest rulemakings could take more than 12 years—spanning potentially four different presidential administrations—to complete. In the meantime, thousands of people would die and tens of thousands more would be injured or become ill because of the lack of regulation.
- The record of the regulatory system indicates there are sufficient procedures to ensure accountability and fairness. In fact, the system is already over-proceduralized. Since the 1990s, statutes and executive orders have added multiple layers of new rulemaking procedures and analytical requirements on top of the Administrative Procedure Act (APA). As a result, the rulemaking process has become an inordinately complex, time-consuming, and resource-intensive process. As a result, the real threat to our society is one of under-regulation, not of overregulation.
- Agencies are the subject of extensive lobbying, particularly by corporations and their trade groups. Moreover, we know that corporate and business lobbying of agencies far exceeds that by groups representing the public. These data confirm that the regulatory process already provides interested parties with fair access to agencies and OIRA to lobby concerning proposed rules.
- The asserted rationales for H.R. 3010 have no basis in reality:
  - Claims of excessive regulatory costs have been completely discredited;
  - Despite rhetoric about “job-killing regulations,” the evidence shows that regulation is not a drag on employment because it stimulates the creation of as many new jobs as are lost, and job gains can more than offset job losses, leading to a net gain in employment; and
  - All of the available evidence contradicts the claim that regulatory uncertainty is deterring business investment. Even if this claim was true,

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<sup>3</sup> Paul R. Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258, 279 (1978).

the proposed legislation would delay regulatory initiatives by several years, increasing regulatory uncertainty, rather than decreasing it.

- The legislation would add over 60 new procedural and analytical requirements to the agency rulemaking process. As communications received by the committee indicate, professors and the practicing bar support almost none of the proposed changes as necessary or appropriate. The few they do support tend to simply codify practices that agencies already carry out either voluntarily or in accordance with prevailing case law.
- The bill would overrule more than 25 environmental, health, and safety statutes by replacing current requirements for justifying a regulation with requirements that a rule must be justified as having benefits greater than its costs and must be the most cost effective available. These substantive changes would substantially weaken existing regulatory protections, enshrining the protection of corporate profit margins, rather than the protection of individuals, as the primary concern of regulatory decision-making.
- Other provisions of the bill add unnecessary analytical and procedural burdens, and give unelected, generalist federal judges with life-time tenure unprecedented new powers over the regulatory system, including the ability to second-guess expert agencies on complex policy judgments.

## II. REGULATIONS BENEFIT SOCIETY GREATLY; THE FAILURE TO REGULATE HARMS SOCIETY GREATLY

All regulations share the same starting point: A provision in a statute passed by both Houses of Congress and signed by the President. Whenever an executive or independent regulatory agency issues a rule, it is merely carrying out the instructions provided in duly enacted legislation for achieving a specified policy goal. These laws provide agencies with an important agenda to carry out, such as protecting people and the environment.

It is a good thing that Congress has directed agencies to issue regulations to achieve goals such as protecting people and the environment, because these regulations have produced enormous benefits, as a recent report by the Center for Progressive Reform (CPR) documents.<sup>4</sup> Consider the following:

- OMB estimates that regulatory benefits exceed regulatory costs by 7 to 1 for significant regulations. The Environmental Protection Agency (EPA) estimates that the regulatory benefit of the Clean Air Act exceeds its costs by a ratio of 25 to 1. Similarly, a study of EPA rules issued during the Obama

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<sup>4</sup> See Sid Shapiro et al., *Saving Lives, Preserving the Environment, Growing the Economy: The Truth About Regulation* (Ctr. for Progressive Reform, White Paper 1109, 2011), available at [http://www.progressivereform.org/articles/RegBenefits\\_1109.pdf](http://www.progressivereform.org/articles/RegBenefits_1109.pdf).

Administration found that their regulatory benefits exceeded costs by a ratio as high as 22 to 1.

- The BP Oil Spill and the Wall Street collapse have imposed billions—perhaps even trillions—of dollars in damages, far more than the cost of regulation that would have prevented these tragedies. Similarly, the failure to regulate day-to-day hazards results in thousands of deaths, tens of thousands of injuries, and billions of dollars in economic damages every year.
- Dozens of retrospective evaluations of regulations by the EPA and the Occupational Safety and Health Administration (OSHA) have found that the regulations were still necessary and that they did not produce significant job losses or have adverse economic impacts for affected industries, including small businesses.

The report concludes:

What is striking about these various strands of information is that they all point to the same conclusions: Americans have benefited greatly from government regulation; the failure to regulate has had tragic consequences for our economy and our environment; and, when evaluated retrospectively, regulation has not caused significant economic dislocations for regulated industries, or even small businesses.<sup>5</sup>

### III. H.R. 3010 WILL GREATLY OSSIFY AN ALREADY OSSIFIED RULEMAKING PROCESS

Clearly, the United States is better off because of the regulation it has in place, but now, more than ever, agencies are being prevented from closing new and remaining regulatory gaps by the destructive convergence of funding shortfalls and excessive procedural hurdles. The 30 pages of additional procedures proposed in H.R. 3010 would only making this bad situation worse, substantially slowing down an already slow rulemaking process and delay critical safeguards by several more years.

Studies indicate that the average time it takes to complete a rule after it is proposed is about 1.5 to 2 years, but no one thinks that any type of significant rule can be completed in such a short time frame. As Professor Richard Pierce has observed, “[I]t is almost unheard of for a major rulemaking to be completed in the same presidential administration in which it began. A major rulemaking typically is completed one, two, or even three administrations later.”<sup>6</sup> The EPA told the Carnegie Commission reports that it takes about five years to complete an informal rulemaking.<sup>7</sup> A Congressional report found that it took the FTC five years and three

<sup>5</sup> *Id.* at 19.

<sup>6</sup> Richard J. Pierce, Jr., *Waiting for Vermont Yankee III, IV and V? A Response to Beermann and Lawson*, 75 GEO. WASH. L. REV. 902, \_\_ (2007).

<sup>7</sup> CARNEGIE COMM'N, RISK AND THE ENVIRONMENT: IMPROVING REGULATORY DECISION MAKING 108 (1993).

months to complete a rule using hybrid rulemaking.<sup>8</sup> These reports do not take into account additional analytical requirements that have been imposed since their publication date.

The five year or more timeframe for important rules should be no surprise, as the following, entirely realistic time schedule for significant rules indicates:

- 12-36 months to develop a proposed rule
- 3 months for OIRA review of the draft proposal
- 3 months for public comment
- 12 months to review comments and write final justification
- 3 months (or more) for OIRA review of the final rulemaking
- 2 months delay under the Congressional Review Act
- 12-36 months for judicial review (assuming a court stays the rule)

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

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

For the country's most important rules, the proposed legislation would add at least 21-33 months to the current delays:

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

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

It already takes four to eight years for an agency to promulgate and enforce significant rules, and the proposed procedures could potentially add another 2 to 4 years to that process. **Under H.R. 3010, the longest rulemakings could take more than 12 years—spanning potentially four different presidential**

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<sup>8</sup> FEDERAL TRADE COMM'N, 98<sup>th</sup> Cong., 2<sup>nd</sup> Sess., 155-66 (Comm. Print 98-cc 1984).

**administrations—to complete.** Conceivably, Congress could help to mitigate the impact of these new requirements by appropriating additional resources to the agencies. There is no indication, however, that the current Congress is considering taking this step. To that contrary, agency face shrinking budgets, which suggests the timeline for completing a rulemaking outlined above could be significantly underestimated.

#### IV. THE FALSE RATIONALES IN SUPPORT OF H.R. 3010

It already takes four to eight years for an agency to promulgate and enforce significant rules, and the proposed procedures would add another two to four years to the process at a minimum. While the proponents may claim it is better to take more time and get it right, we cannot forget that delay imposes real costs on real people. We must therefore be careful not to extend regulatory procedures unless they are likely to improve the administrative process. The record of the regulatory system does not reveal that more accountability is necessary. If anything, current accountability mechanisms are already too excessive, and actually inhibit agencies from effectively carrying out their statutory missions.

##### A. Agency Government Is Fair and Accountable

Administrative agencies are already subject to a thick web of accountability procedures. Indeed, there are already so many procedures that the most complicated and significant rules can take as long as six to eight years, or even more, to complete, as noted earlier. Agencies are also subject to extensive lobbying, particularly by corporate and business entities.

The Administrative Procedure Act (APA) requires agencies to provide persons affected by their regulations a fair opportunity to influence the rulemaking process and several mechanisms exist for holding agencies accountable for their regulatory actions. Under traditional APA rulemaking, a regulatory proposal is meant to start the discussion, not end it. Indeed, the agency must solicit and actually *consider* comments it receives from the public on the proposal. If the agency discovers during the comment process that it has strayed beyond its statutory authority, neglected relevant considerations, or misunderstood the science on which it based its proposal, the APA requires the agency to revise the rule accordingly before finalizing it, or not adopt the rule at all. This is not some hollow exercise. Rather, the courts strictly enforce it.

Since the 1990s, statutes and executive orders have added multiple layers of new rulemaking procedures and analytical requirements on top of the APA. As a result, the rulemaking process has become an inordinately complex, time-consuming, and resource-intensive process:

- As of 2000, an agency was subject to a potential of as many 110 separate procedure requirements in the rulemaking process.<sup>9</sup> Additional procedural requirements have been added since 2000.<sup>10</sup>
- A flowchart developed by Public Citizen to document the rulemaking process covers several square feet, and, because of the complexity involved, it still requires tiny font in order to include every last rulemaking step.<sup>11</sup>

Besides procedural requirements, agencies are the subject of extensive lobbying, particularly by corporations and their trade groups. Moreover, we know that corporate and business lobbying of agencies far exceeds that by groups representing the public.

- When Professor Wendy Wagner and her coauthors examined 39 hazardous air pollutant rulemakings at the EPA, they found that industry interests had an average of 84 contacts per rule, while public interest groups averaged 0.7 contacts per rule.<sup>12</sup> These included meetings, phone calls, and letters.
- A forthcoming CPR study found that the Office of Information and Regulatory Affairs (OIRA) held 1,080 meetings with outside parties concerning proposed regulations in the period from October 16, 2001 until June 1, 2011, involving 5,755 participants. Sixty-five percent of the persons attending meetings were from industry or law and lobbying firms representing industry, while only 12 percent of participants represented public interest groups.<sup>13</sup>

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

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<sup>9</sup> See Mark Seidenfeld, *A Table of Requirements for Federal Administrative Rulemaking*, 27 FLA. ST. L. REV. 533 (2000) (documenting that executive orders and statutory requirements could require as many as 110 different requirements for rulemaking), available at <http://www.law.fsu.edu/journals/lawreview/downloads/272/Seid.pdf>.

<sup>10</sup> See, e.g., Exec. Order No. 13,586, 76 Fed. Reg. 3,821 (Jan. 18, 2011).

<sup>11</sup> See Public Citizen, *The Federal Rulemaking Process*, available at <http://www.citizen.org/documents/Regulations-Flowchart.pdf>.

<sup>12</sup> Wendy Wagner, Katherine Barnes, & Lisa Peters, *Rulemaking in the Shade: Empirical Study of EPA's Toxic Air Regulations*, 63 ADMIN. L. REV. 99, 225 (2011).

<sup>13</sup> Rena Steinzor, James Goodwin, & Michel Patoka, *Behind Closed Doors at the White House: How Politics Trumps Protection of Public Health, Worker Safety, and the Environment* (forthcoming) (Ctr. for Progressive Reform, White Paper 1111, 2011) (on file with author).



## B. Regulations Do Not Impose Unreasonable Costs

For the past year, regulatory opponents have frequently cited a 2010 study by Nicole Crain and Mark Crain, done for the Office of Advocacy of the Small Business Administration (SBA), which stated, among other claims, that the annual cost of federal regulations in 2008 was about \$1.75 trillion.<sup>14</sup> A CPR White Paper found that the methods used by Crain and Crain to arrive at their cost figure were so flawed that their estimate must be regarded as unreliable.<sup>15</sup> Subsequently, the nonpartisan Congressional Research Service (CRS) published its own report examining the study, which found the same flaws as identified in the CPR White Paper, and additional problems as well.<sup>16</sup> OIRA Administrator Cass Sunstein has characterized Crain and Crain as “deeply flawed” and referred to the study as an “urban legend.”<sup>17</sup>

Regulatory opponents’ unrelenting focus on the alleged high costs of regulation suffers from an even more fundamental problem, however. Regulations, strictly speaking, typically do not impose *new* costs on society, as Robert Adler, one of the current commissioners of the Consumer Product Safety Commission (CPSC), observed in a recent *New York Times* op-ed. Rather, they “simply re-allocate who pays the costs.”<sup>18</sup> In other words, when a regulation is blocked, the costs to industry of that regulation do not vanish into thin air. Instead, those costs continue to be imposed on the general public, in terms of lives lost, preventable cancers, and lost work days. For example, a recent study of the environmental and public health externalities generated by different industries found that the coal-fired power plants create air pollution damages that are much larger than the value they provide to society.<sup>19</sup> By definition, the general public bears the costs of these externalities,

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<sup>14</sup> NICOLE V. CRAIN AND W. MARK CRAIN THE IMPACT OF REGULATORY COSTS ON SMALL FIRMS (2010) available at <http://www.sba.gov/sites/default/files/rs371tot.pdf>.

<sup>15</sup> Sidney Shapiro et al., *Setting the Record Straight: The Crain and Crain Report on Regulatory Costs* (Ctr. for Progressive Reform, White Paper 1103, 2011) available at [http://www.progressivereform.org/articles/SBA\\_Regulatory\\_Costs\\_Analysis\\_1103.pdf](http://www.progressivereform.org/articles/SBA_Regulatory_Costs_Analysis_1103.pdf).

<sup>16</sup> Curtis W. Copeland, *Analysis of an Estimate of the Total Costs of Federal Regulations* (Cong. Research Serv., R41763, Apr. 6, 2011)

<sup>17</sup> *Unfunded Mandates, Regulatory Burdens and the Role of Office of Information and Regulatory Affairs, Hearing Before the Subcomm. on Tech., Info. Pol’y, Intergovernmental Relations & Procurement Reform of the H. Comm. on Oversight & Gov’t Reform*, 112th Cong. (2011) (testimony of Cass Sunstein, Administrator, Office of Information and Regulatory Affairs), available at [http://oversight.house.gov/index.php?option=com\\_content&view=article&id=1299%3A5-25-2011-quinfunded-mandates-regulatory-burdens-and-the-role-of-office-of-information-and-regulatory-affairs&catid=14&Itemid=1](http://oversight.house.gov/index.php?option=com_content&view=article&id=1299%3A5-25-2011-quinfunded-mandates-regulatory-burdens-and-the-role-of-office-of-information-and-regulatory-affairs&catid=14&Itemid=1); James Goodwin, *Sunstein Denounces SBA’s ‘Deeply Flawed’ Study of Regulatory Costs*, CPRBlog, <http://www.progressivereform.org/CPRBlog.cfm?idBlog=5758C6D6-AC7E-4BAF-CF1DA8672B3AB937> (last visited June 21, 2011).

<sup>18</sup> Robert S. Adler, Op-Ed, *Safety Regulators Don’t Add Costs. They Decide Who Pays Them*, N.Y. TIMES, Oct. 16, 2011, available at [http://www.nytimes.com/2011/10/17/opinion/safety-regulators-dont-add-costs-they-decide-who-pays-them.html?\\_r=2&partner=rssnyt&emc=rss](http://www.nytimes.com/2011/10/17/opinion/safety-regulators-dont-add-costs-they-decide-who-pays-them.html?_r=2&partner=rssnyt&emc=rss).

<sup>19</sup> Nicholas Z. Muller, Robert Mendelsohn & William Nordhaus, *Environmental Accounting for Pollution in the United States Economy*, 101 AM. ECON. REV. 1649 (2011), available at <http://pubs.aeaweb.org/doi/pdfplus/10.1257/aer.101.5.1649>.

and improved regulation of coal-fired power plants would shift some or all of these costs to the power plant owners.

### C. Regulations Do Not Inhibit Economic Growth

Regulatory opponents contend that regulations slow economic growth and contribute to job losses, but existing studies do not support this claim. Instead, the studies find either no overall impact or, in some cases, an actual increase in employment.<sup>20</sup> A recent economic analysis, for example, found that the EPA's strict proposal to regulate coal ash waste would result in a net increase of 28,000 jobs.<sup>21</sup> Further, Department of Labor data suggest that few jobs are lost because of regulation.<sup>22</sup> An average of only 0.3 percent of workers lost their jobs because of government regulations or intervention during the years 2007 through 2009. This result is similar to data concerning layoffs prior to 2007.<sup>23</sup> By comparison, the same data find that extreme weather events have caused more extended mass layoffs.<sup>24</sup>

### D. Regulatory Uncertainty Is Not An Obstacle to Economic Growth

A current refrain among regulatory opponents is that regulatory uncertainty is holding back the economy, preventing the United States from emerging from the current recession. All of the available evidence directly contradicts this claim:

- The sectors of the economy in which the most regulatory activity is taking place—the healthcare industry, mining, and the financial sector—have among the lowest levels of unemployment in the country, and the

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<sup>20</sup> See Isaac Shapiro & John Irons, *Regulation, Employment & and the Economy: Fears of Job Loss Are Overblown* (Env'tl. Pol'y Inst., Briefing Paper No. 305, 2011) (summarizing the evidence), available at [http://epi.3cdn.net/961032cb78e895dfd5\\_k6m6bh42p.pdf](http://epi.3cdn.net/961032cb78e895dfd5_k6m6bh42p.pdf); Frank Ackerman & Rachel Massey, *Prospering with Precaution: Employment, Economics, and the Precautionary Principle* (Global Dev. & Env't Inst., Working Paper, 2002) (same), available at <http://www.healthytomorrow.org/attachments/prosper.pdf>.

<sup>21</sup> FRANK ACKERMAN, EMPLOYMENT EFFECTS OF COAL ASH REGULATION (Stockholm Environment Institute – U.S. Center, Tufts University, 2011), available at [http://sei-us.org/Publications\\_PDF/Ackerman-coal-ash-jobs-Oct2011.pdf](http://sei-us.org/Publications_PDF/Ackerman-coal-ash-jobs-Oct2011.pdf). While higher electricity prices caused by the regulation would lead to some job losses, these losses are more than offset by the job gains that would result from the expenditures by industry to come into compliance with the strict standard. In particular, coal-fired power plants would need to spend money on waste management, wastewater treatment, and construction and operation of facilities and equipment—all of which are labor-intensive activities and would generate significant increases in employment.

<sup>22</sup> Isaac Shapiro & John Irons, *Regulation, Employment & and the Economy: Fears of Job Loss Are Overblown* 20 (Env'tl. Pol'y Inst., Briefing Paper No. 305, 2011), available at [http://epi.3cdn.net/961032cb78e895dfd5\\_k6m6bh42p.pdf](http://epi.3cdn.net/961032cb78e895dfd5_k6m6bh42p.pdf).

<sup>23</sup> *Id.* See also GOODSTEIN, *supra* note 40, at 35-37 (summarizing data from 1970-90 and finding similarly small numbers of workers being laid off because of environmental regulations).

<sup>24</sup> *Regulations Do Not Hinder U.S. Job Market, Paper Finds*, OMB WATCH, <http://www.ombwatch.org/node/11615> (last visited Oct. 21, 2011).

unemployment rate in these sectors is significantly lower than the national average.<sup>25</sup>

- Surveys of business owners reveal relatively little anxiety over the current regulatory climate. Instead, many business owners cite the lack of demand as the biggest impediment to economic growth and hiring.<sup>26</sup>
- The experience of other countries with similar economies further calls regulatory uncertainty argument into question. Those countries that are not planning any major regulatory initiatives are experiencing the same anemic economic recovery as the United States.<sup>27</sup>

Even assuming the facts supported the regulatory uncertainty argument, H.R. 3010 (and other legislative proposals that would gum up the regulatory process further) would exacerbate regulatory uncertainty rather than alleviate it. As explained above, the new analytical requirements and judicial review provisions of H.R. 3010 would potentially delay significant new regulations by two to four years more, thereby prolonging regulatory uncertainty longer than it currently exists.

## V. H.R. 3010 WILL IMPAIR THE REGULATORY SYSTEM, NOT IMPROVE IT

H.R. 3010 constitutes a drastic overhaul of the APA:

- The new bill makes more than 30 pages worth of changes to the current APA, which currently totals about 45 pages in length (not counting its Freedom of Information Act provisions).
- More significantly, as two letters to the committee indicate,<sup>28</sup> administrative law professors and the practicing bar support almost none of the proposed changes as necessary or appropriate.

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<sup>25</sup> See Matthew Yglesias, *Where Is The Evidence That 'Regulatory Uncertainty' Has Increased? What Would Decrease It?*, THINKPROGRESS, Sept. 8, 2011, <http://thinkprogress.org/yglesias/2011/09/08/314950/where-is-the-evidence-that-regulatory-uncertainty-has-increased-what-would-decrease-it/> (last visited Oct. 18, 2011).

<sup>26</sup> See, e.g., Kevin G. Hall, *Regulations, Taxes Aren't Killing Small Business, Owners Say*, MCCLATCHY, Sept. 1, 2011, available at <http://www.mcclatchydc.com/2011/09/01/122865/regulations-taxes-arent-killing.html>.

<sup>27</sup> See Daniel Farber, *Ten Fatal Flaws in the "Regulatory Uncertainty" Argument*, CPRBLOG, Sept. 12, 2011, <http://www.progressivereform.org/CPRBlog.cfm?idBlog=5DF93B0F-D47C-D726-57628120754ECD93> (last visited Oct. 18, 2011).

<sup>28</sup> See Letter from Undersigned Administrative Law Professors, Oct. 30, 2011; American Bar Association, Section of Administrative Law & Regulatory Practice, Comments on H.R. 3010, Oct. 30, 2011.

### A. H.R. 3010 Establishes Several New, Unnecessary Analytical Requirements

H.R. 3010 would require agencies to make a series “preliminary and final determinations” with respect to several different “rulemaking considerations.” Although agencies already account for some these considerations, others are new, and would involve highly complex, resource-intensive, and time-consuming analyses by the agencies.

Although making these determinations would be very expensive, they would generate relatively small benefits in terms of improved quality of rulemaking. The required analyses of indirect and cumulative costs and benefits would be especially problematic in this regard.<sup>29</sup> Admittedly, some of the required determinations may be useful in some rulemakings. But, under the current APA process, findings for these determinations would likely take place anyway as a result of the interaction between the agency and public stakeholders through notice-and-comment procedures. There is no principled reason to require many of the determinations, and there is certainly no principled reason to require *all* of these determinations for *all* rules. The inevitable outcome would be delayed rulemakings and the waste of scarce agency resources.

Consider, for example, that the bill requires an agency to undertake a cost-benefit study for “any reasonable alternatives for a new rule or other response identified by the agency or interested persons.” While the agency might identify a few reasonable alternatives, it would also be forced to consider any alternatives proposed by stakeholders. A stakeholder intent on tying up the agency with endless analysis would therefore have a strong incentive to propose several alternatives. The resources and time an agency would require to conduct cost-benefit analyses on all these alternatives could be enormous, and effectively prevent the agency from making any progress on the rulemaking.

### B. H.R. 3010 Establishes a Costly and Dangerous Expansion of Federal Judiciary Authority

It is also a mistake to subject the adequacy of agency determinations of all of these rulemaking considerations to judicial review. If a court determines that an agency has failed to adequately conduct a required determination, and finds that this failure is prejudicial, it would be empowered to torpedo the entire rule, resulting in more

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<sup>29</sup> The bill provides no definition for “indirect” or “cumulative” costs and benefits that would clearly delineate the scope of this inquiry. An analysis of indirect costs, cumulative costs, and impacts on ancillary issues such as employment and economic growth could stretch on forever and would by necessity be based on dubious assumptions and endless speculation. The results of these inquiries would come at great costs and provide little utility to agency decision-makers.

delay and waste of agency resources.<sup>30</sup> As generalists, courts are ill equipped to assess the adequacy of agency determinations on highly complex policy matters. Opening up these determinations to judicial review could also conceivably increase the volume and complexity of challenges to agency rulemakings. This would place additional stress on the federal court system, which is already overstretched by increased workloads and persistent vacancies.

### C. H.R. 3010 Overrules More Than 25 Current Regulatory Statutes

Since the Reagan Administration, a series of executive orders have directed agencies to conduct cost-benefit analyses on some of their rules. Unlike these orders, which require only cost-benefit analysis, H.R. 3010 would require agencies to justify their final rules in cost-benefit terms. It also requires agencies to choose the least-cost alternative available to it.

Most current regulatory mandates are based on the premise that the country should do “the best we can” to decrease the number of deaths and serious injuries from air pollution, unsafe foods, dangerous products, unsafe workplaces, and other risks that we cannot prevent as individuals.<sup>31</sup> Although the statutes vary somewhat in how they accomplish this goal, they generally require regulators to seek the greatest level of protection that is technologically available and that is affordable for regulated entities. Other statutes require an agency to set its regulatory goals on the basis on some defined level of safety or precaution, and then allow some variations based on cost and other considerations.

These commitments honor the intrinsic value of human life by taking all reasonable precautions. The sponsors of this bill apparently believe that doing the best we can to prevent deaths is wasteful because it does not consider how much (according to economists) it is worth to prevent someone from being killed from such hazards. So, they would prevent agencies from regulating at all unless the regulatory benefits justify regulatory costs, a mandate that wipes out the “do the best we can” goal of important protective laws like the Clean Air Act and the Clean Water Act. If H.R. 3010 had been the law in the 1970s, the government almost certainly would not have required the removal of most lead from gasoline until perhaps decades later.<sup>32</sup>

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<sup>30</sup> Currently, under the APA, a reviewing court may set aside a rule if it finds that the rule is “arbitrary” or “capricious”—or if some finding or conclusion that is essential to the rule is “arbitrary” or “capricious.” 5 U.S.C. 706(2)(A). Under H.R. 3010, this is the standard of review that would apply to court review of agency compliance with many of the bill’s new analytical and procedural requirements.

<sup>31</sup> See SIDNEY A. SHAPIRO & ROBERT L. GLICKSMAN, *RISK REGULATION AT RISK: RESTORING A PRAGMATIC APPROACH* (2003); Rena Steinzor et. al., *A Return to Common Sense: Protecting Health, Safety, and the Environment Through “Pragmatic Regulatory Impact Analysis”* (Ctr. for Progressive Reform, White Paper 909, 2009), available at [http://www.progressivereform.org/articles/PRIA\\_909.pdf](http://www.progressivereform.org/articles/PRIA_909.pdf).

<sup>32</sup> Frank Ackerman, Lisa Heinzerling, & Rachel Massey, *Applying Cost-Benefit to Past Decisions: Was Environmental Protection Ever a Good Idea?*, 57 ADMIN. L. REV. 155, 160-72 (2005).

By requiring a cost-benefit justification as a matter of law, and by making that requirement judicially reviewable, H.R. 3010 invites endless litigation over the adequacy of the cost-benefit analysis of the agency. Since cost-benefit analysis is, at best, inexact and manipulable,<sup>33</sup> we can expect those opposed to an agency decision to find numerous ways to challenge its analysis.

#### D. H.R. 3010 Requires ANPRMs, Even Where Not Necessary

An Advanced Notice of Proposed Rulemaking (ANPRM) can be a useful exercise in some instances, such as when an agency is regulating in a new area for the first time. A blanket requirement for ANPRM for all “major” and “high impact” rules—as defined by H.R. 3010—is clearly unwarranted, however. ANPRMs can be helpful for refining complex issues before an agency begins development of a proposed rule. For most rules—even most controversial and expensive ones—all the relevant complex issues have been sufficiently refined in previous rulemaking exercises, rendering this step unnecessary. Instead, this requirement would only succeed in delaying rulemakings even more and making the rulemaking process even more costly and resource intensive than it is now. Agencies are in the best position to determine when an ANPRM would be useful, and in fact already voluntarily take this step when it is needed. H.R. 3010 should not force agencies to complete an ANPRM when it would otherwise not be beneficial, though it might be useful to amend the APA to explicitly recognize ANPRMs, something that it does not currently do.

#### E. H.R. 3010 Requires IQA Hearings That Duplicate Notice and Comment Rulemaking

As a threshold matter, hearings are not the best mechanism for resolving disputes over scientific evidence and data. Instead, hearings are better equipped for resolving questions of pure fact, as they are used in the criminal and civil law contexts. The benefits, if any, of these hearings would be small and certainly would not justify their high costs. Instead, the traditional notice-and-comment process—supervised through judicial review—provides a better method for ensuring that agencies can establish the reliability of the evidence and information upon which they rely.

In addition, responding to these IQA challenges could become a costly burden for agencies. Regulated industries would have a strong incentive to submit several IQA petitions at once, knowing that the agency’s limited resources and the tight timeline for resolving these petitions would likely force the agency to exclude several pieces of information or evidence that it would have needed to justify a stronger

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<sup>33</sup> See SHAPIRO & GLICKSMAN, *supra* note 33, at 92-120 (detailing the shortcomings of cost-benefit analysis); Sidney A. Shapiro & Christopher H. Schroeder, *Beyond Cost-Benefit Analysis: A Pragmatic Reorientation*, 32 HARV. ENV. L. REV. 433, 450-59 (2008) (same); Steinzor et al., *supra* note 33, at 10-23 (same; providing case studies illustrating the shorting comings of cost-benefit analysis).

regulation. As a result, agencies might end up adopting rules that are poorly supported, rendering them susceptible to being overturned in court, or even adopt weaker rules than what the best available science might otherwise have called for. In either case, people and the environment would be left inadequately protected.

#### F. H.R. 3010 Requires Formal Rulemaking Procedures Even Though These Procedures Have been Widely Rejected

H.R. 3010 greatly expands the circumstances under which agencies would be required to employ formal rulemaking hearings.<sup>34</sup> Almost no serious administrative law expert regards formal rulemaking as reasonable, and it has been all but relegated to the dustbin of history. The reason that formal rulemaking procedures have been almost universally rejected is that their costs far outweigh their benefits. As noted above, hearings are not well suited for resolving complex policy questions, yet the issues that H.R. 3010 requires to be resolved during a formal rulemaking hearing all constitute these kinds of facts (*e.g.*, “Whether there is an alternative to the proposed rule that would achieve the relevant statutory objectives at a lower cost (including [indirect and cumulative costs]”). A formal rulemaking hearing on these issues would generate little, if any, benefits in terms of helping to shape better regulatory decisions. At the same time, these hearings can be extremely costly to conduct, and often delay the completion of rules by several months or even years.

#### G. H.R. 3010 Requires Burdensome Ongoing Look-Back Procedures

Periodic look-back procedures for existing regulations can be very useful if designed properly and if agencies are provided with the necessary budgetary and personnel resources for conducting them. H.R. 3010’s look-back procedures meet neither of these criteria.

H.R. 3010 would require agencies to conduct a look-back for every major and high impact rule it issues no less than once every 10 years. H.R. 3010 would not provide for any funding increases for the agencies to conduct these reviews, however. As such, this look-back requirement would impose a huge burden on agencies, forcing them to dedicate their limited resources to looking back at old regulations at the

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<sup>34</sup> Specifically, H.R. 3010 says it would require formal rulemaking hearings for nearly all “high impact” rules, but the bill actually expands this requirement beyond just these rules. The bill would establish a new section 553(h), which states “When a hearing is required under subsection (e) *or is otherwise required by statute or at the agency’s discretion* before adoption of a rule, the agency shall comply with the requirements of sections 556 and 557 in addition to the requirements of subsection (f) in adopting the rule and in providing notice of the rule’s adoption” (emphasis mine). By law, many agencies, including the Occupational Safety and Health Administration (OSHA) and the Mining Safety and Health Administration (MSHA) employ “hybrid” rulemaking procedures that combine elements of formal and information (*i.e.*, notice-and-comment) procedures. Critically, these hybrid procedures are less onerous, time-consuming, and costly than full-fledged formal rulemaking procedures. This section would therefore displace existing statutory requirements and mandate that these agencies engage in full-fledged formal rulemaking procedures.

expense of looking forward to establish new safeguards to address emerging threats to people and the environment. The better approach would be to allow agencies to decide which rules they should review and on what timeline. Agencies might find that it is better to review certain regulations more frequently than once a decade, while other regulations would not need to be reviewed at all. Under this approach, the quality of the look-backs would be much higher, and agencies would be better able to revise existing regulations to increase their effectiveness and reduce regulatory burdens. In contrast, look-backs conducted pursuant to H.R. 3010's requirements would likely end up being more superficial, and, as a result, the agencies would be less likely to undertake meaningful reforms of existing regulations.

#### H. H.R. 3010 Establishes New Onerous Judicial Review Requirements

As noted above, H.R. 3010 establishes several complex policymaking considerations that agencies must account for in their regulatory decision-making—including detailed cost-benefit analyses for the selected regulatory option and all other alternatives the agency considered—and it subjects agencies' compliance with these requirements to judicial review. Judicial review of these requirements raises several concerns. For one thing, these considerations involve complex policy matters that are well beyond the ken of generalist judges. For another, judicial review of these considerations could further strain the already overstretched federal judiciary.

In addition, H.R. 3010 alters the APA's judicial review provisions by directing reviewing courts to *not* defer to agency determinations or interpretations under certain circumstances. Specifically, H.R. 3010 provides that a court is not supposed to defer to agency determinations or interpretations unless the agency adhered to certain prescribed procedures or guidelines in reaching those determinations or interpretations. For example, H.R. 3010 states a court "shall not defer" to an agency's determination of a rule's costs and benefits if it finds that the agency did not adhere to OIRA's cost-benefit analysis guidelines. These provisions raise several concerns. First, it is not clear how a court is supposed to make the finding that an agency has failed to follow the required procedures or guidelines. Second, by failing to give deference to agency determinations on matters such as cost-benefit analysis, courts would then be put in the position of making these determinations on their own. In comparison to the expert agencies, courts are ill equipped to make these determinations, however. Third, judicial determination of these complicated policy matters would increase the complexity of the cases that courts will hear regarding challenges to agency rules. Resolving these cases will further strain the already overstretched federal judiciary.



## I. H.R. 3010 Establishes Burdensome, One-Size-Fits-All Requirements for Major Guidance Documents

H.R. 3010 requires agencies to account for several complex policy considerations and to consult with OIRA before they can issue major guidance documents. Significantly, one of the required considerations agencies must make is a determination that the guidance document's benefits justify its costs, including indirect and cumulative costs.

Some of the required considerations may be useful for the development of some guidance documents, but it is a bad idea to apply all of these requirements to all guidance documents. Instead, agencies should be provided with maximum flexibility to issue guidance documents in a timely fashion. After all, the purpose of guidance documents is to reduce regulatory uncertainty—something that is of great interest to regulated industry. In fact, regulated industries typically support the vast majority of guidance documents, and would tend to be reluctant to endorse any new procedure requirements that may inhibit their timely release. The one-size-fits-all procedures mandated in H.R. 3010, particularly the cost-benefit analysis requirement, would deny agencies the flexibility they need to issue guidance documents in a timely fashion, resulting in preventable regulatory uncertainty. In light of these complex procedural requirements, agencies may even forgo issuing guidance documents altogether.