A New Report on the Post-Election

Red Tape Rush

Congressional Action Needed to
Cut Red Tape and Stop Agency Overreach

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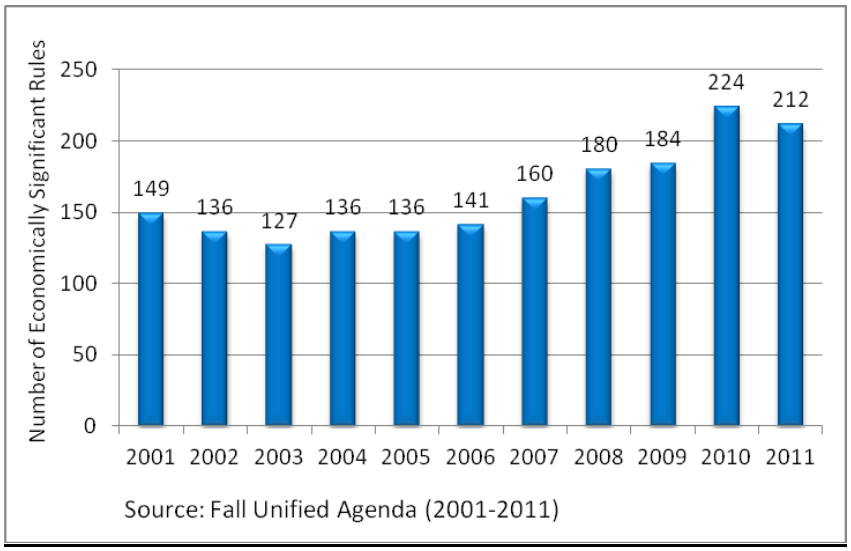
Key Findings:

- ✓ Under the Obama Administration, federal agencies have greatly expanded their authority into the constitutional lawmaking role of Congress.



- ✓ Activist groups have taken advantage of this regulatory overreach to successfully achieve significant policy changes that block economic growth across the country.

- ✓ President Obama's second term is expected to bring even more excessive regulations that burden small business owners and discourage job creation. As the *Wall Street Journal* Editorial Board reported on November 23rd, 2012, "*…this new regulatory flood will increase costs and uncertainty.*"

- ✓ Unless Congress immediately passes regulatory reform to reassert its traditional lawmaking authority, Americans will continue to see Washington red tape destroy their jobs.

- ✓ In 2012, the House of Representatives passed three pieces of legislation that will cut red tape and put Congress back in charge of policy:

    1. Regulatory Accountability Act (H.R. 3010/S. 1606)
    2. Responsibly and Professionally Invigorating Development Act (RAPID Act, H.R. 4078)
    3. Sunshine for Regulatory Decrees and Settlements Act (H.R. 3862/S. 3382)

- ✓ Senators have introduced many of these bills. We need to pass them immediately so that we can level the playing field for Congress to enact sound economic policies that create jobs. Other key legislation needs to be identified that can also rein in federal agencies and anti-job activist groups.

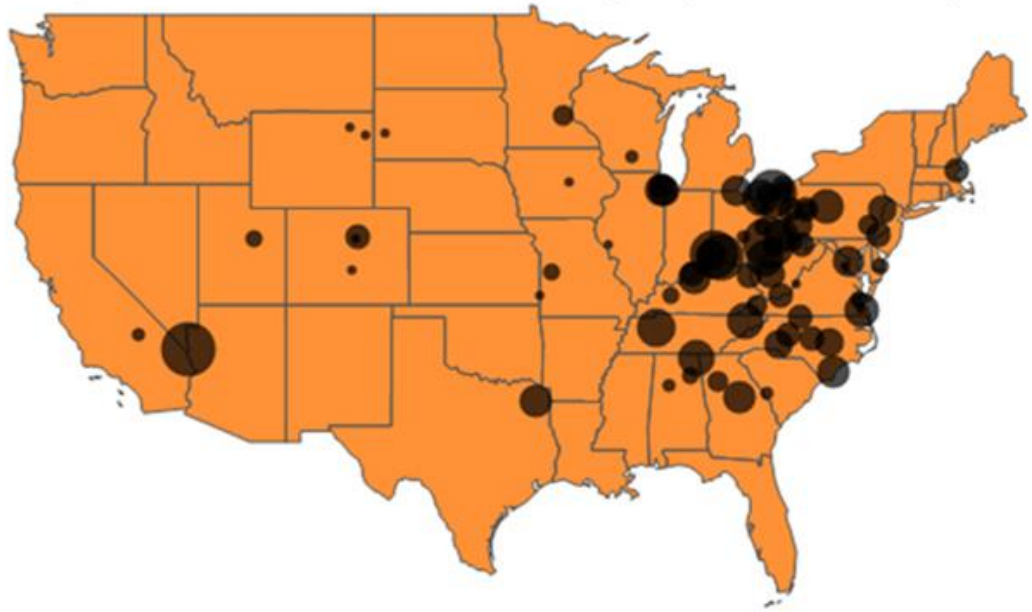
The Case for Regulatory Reform

We must level the playing field for large and small businesses

Federal agencies have grown so powerful that it is virtually impossible for average folks to stop red tape that crushes jobs and prevents economic growth. Time and time again, federal agencies have issued new sweeping rules that wipe out entire industries. We have seen this most recently with the "War on Coal" by the Environmental Protection Agency (EPA). Examples include EPA's New Source Performance Standards for greenhouse gas emissions from new coal-fired power plants, the Mercury and Air Toxics Standards (MATS), the Cross-State Air Pollution Rule, and EPA's Coal Combustion Residuals Rule to name a few. Industries need a fighting chance against EPA unfairly targeting their businesses in this way. In order to do that, we need to give businesses the ability to –

- ✓ Challenge EPA's flawed scientific data
- ✓ Stop judicial legislating through activist sue-and settle-tactics and
- ✓ Create jobs by streamlining environmental permitting of job creating projects

27 Gigawatts of Coal-Fired Electric Capacity Set to Retire by 2016



Circles sized by number of megawatts

Challenging EPA's Flawed Scientific Data

It seems that the agency issuing the rule is considered to be the sole arbiter of what is fact versus fiction – and the affected industries have no voice. That is why for rules that are the most costly, a hearing must be held that would allow affected parties to make their case in favor or against the rule.

Additionally, if the agency misstates the facts, affected parties should be able to have legal standing to challenge the agency in court. Currently no one can challenge these agency misstatements under the Information Quality Act in court, a law that was meant to hold agencies accountable for the facts, figures and models that they rely on. If EPA had to comply with the Information Quality Act, a whole host of their proposed and existing rules would not hold up to scrutiny in court.

For example, the EPA's own Inspector General cited the agency for not following its own peer review process for their Endangerment Finding, which stated that carbon dioxide - something humans exhale and is a building block of life - is a pollutant that must be regulated under the Clean Air Act. This Inspector General review was requested by Senate Environment and Public Works Ranking Member Jim Inhofe. The September 26th, 2011 EPA Inspector General report found that the EPA's Endangerment Finding peer review –

> *"…did not meet all OMB requirements for peer review of a highly influential scientific assessment primarily because the review results and EPA's response were not publicly reported, and because 1 of the 12 reviewers was an EPA employee."*

In response, Ranking Member Inhofe stated -

> *"This report confirms that the endangerment finding, the very foundation of President Obama's job-destroying regulatory agenda, was rushed, biased, and flawed. It calls the scientific integrity of EPA's decision-making process into question and undermines the credibility of the endangerment finding."*

With standing in court to enforce the Information Quality Act, businesses would have another tool to challenge agency actions, such as EPA's Endangerment Finding and other regulations that have resulted from it. Businesses and the general public must be protected from shoddy peer reviews and slanted data that lead to job-crushing agency actions.

Additionally, the idea of regulatory reform has been around for years. Executive orders have been issued to improve the way agencies issue rules, such as requiring cost-benefit analysis of agency actions. But these Executive Orders are seldom followed. Among these orders are President Ford's Executive Order 11821, President Carter's Executive Order 12044, President Reagan's Executive Order 12291, and President Clinton's Executive Order 12866. Once again, it is up to Congress to ensure that they are complied with by codifying these proposals from previous Administrations.

Stop judicial legislating through activist sue and settle tactics

When regulations are moving through the process, bureaucrats rarely consider how their actions will impact America's job creators. In fact, many of our small and large business leaders aren't even allowed to fully participate in the process.

Time and time again, we've seen that extreme activists and their allies in federal agencies have stacked the deck against job creators. It's too easy for activists to go into a friendly federal court in one state and sue EPA or the Department of Interior to force a restrictive new mandate on other states. This is exactly what happened in an Oakland federal courtroom to impose stringent new regional haze requirements on a number of western states.

William Yeatman of the Competitive Enterprise Institute testified before the House Oversight and Government Reform Committee on June 28th, 2012 regarding this sue–and-settle phenomenon –

> *"Beginning in 2009, a group of nonprofit environmental advocacy organizations—Sierra Club, WildEarth Guardians, Environmental Defense Fund, National Parks Conservation Association, Montana Environmental Information Center, Grand Canyon Trust, San Juan Citizens Alliance, Our Children's Earth Foundation, Plains Justice, and Powder River Basin Resource Council—filed lawsuits against EPA alleging that the agency had failed to perform its non-discretionary duty to act on state submissions for regional haze. Rather than litigate these cases, EPA simply chose to settle. In five consent decrees negotiated with environmental groups—and, importantly, without notice to the states that would be affected—EPA agreed to commit itself to various deadlines to act on all states' visibility improvement plans.*
>
> *"Like a one-two, left-right boxing combination, EPA first objects to the process used by the states to comply with Regional Haze, and then the Agency claimed it has no choice but to impose its preferred controls in order to comply with the consent decree. Thus, EPA has trumped the states rightful authority on Regional Haze."*

Yeatman added –

> *"The costs of EPA's imposed Regional Haze plans are significant; the benefits, however, are suspect. According to peer-reviewed research, the visibility improvement achieved by EPA's Regional Haze plans is imperceptible to the average person."*

EPA was more than happy to "throw in the towel" and accede to the activists' demands to significantly restrict coal fired power through a court settlement. The only problem is that none of the affected states or affected industries was present or parties to the agreement.

It can take Congress months, if not years, to pass certain legislation. Congress cannot keep up with the speed and effectiveness of the sue-and-settle tactic to impose sweeping

regulations that crush jobs in a matter of weeks. That is why we need legislation that can give states and businesses a seat at the table before these agreements are signed. Such legislation can give the public ample notification and the ability for public comments ahead of time so that billion dollar job-crushing regulations don't sneak up on already struggling businesses and cash strapped states.

Create jobs by streamlining environmental permitting of job creating projects

The system of environmental permitting has gotten dramatically worse since laws such as the National Environmental Policy Act (NEPA) were passed with bipartisan support. Now these laws are being used to stop development across the country. Whether it is to dredge a harbor, build a bridge or a power plant, environmental permitting has been hijacked by activist groups to ensure that the least amount of development occurs. In the process, thousands of jobs have simply been put on hold indefinitely and will never be created.

The situation has been worsening every year. According to April 25th testimony this year from Bill Kovacs of the U.S. Chamber of Commerce before the House of Representatives' Judiciary Subcommittee on Courts, Commercial, and Administrative Law, it can take up to 18.4 years to prepare an Environmental Impact Statement (EIS), resulting in an average span of 3.4 years (from 1998 to 2006). The average time to complete an EIS has increased by 37 days each year since 2006 according to a 2008 study he cited (Piet deWitt, Carole A. deWitt).

Kovacs noted that –

> *"The Hoover Dam was built in five years. The Empire State Building took one year and 45 days. The New Jersey Turnpike needed only four years from inception to completion. Fast forward to 2012, and the results are much different. Cape Wind has needed over a decade to find out if it can build an offshore wind farm. Shell Corporation is at six years and counting on its permits for oil and gas exploration in Beaufort Bay. And the Port of Savannah, Georgia has spent thirteen years reviewing a potential dredging project, with no end to the review process in sight."*

Two key reforms are needed to address this backlog of job creating projects. The first is that legal challenges to infrastructure projects must be brought within 180 days, as opposed to six years, as currently allowed under law. This six-year statute of limitations gives extreme activists the opportunity to file challenges at the very end of the sixth year, unduly delaying important job-creating projects. In addition, reform is needed to ensure that federal agencies must concurrently, as opposed to sequentially, review proposed projects. Currently agencies conduct multiple reviews on the same project one after the other. It makes no sense that these reviews cannot be conducted concurrently so as not to delay job creation.

Immediate Action:

To prevent more red tape and help our economy, Congress should immediately pass three bills in the 113th Congress:

1. **Regulatory Accountability Act (H.R. 3010/S. 1606),** introduced by Rep. Lamar Smith and Sen. Rob Portman. *Passed the House of Representatives by a 253 to 167 vote.* Among other things, the bill would:

    - Require on-the-record administrative hearings for the costliest administrative rules;

    - Allow judicial review under the Information Quality Act; and

    - Codify regulatory reforms contained in current executive orders that agencies are not complying with.

2. **Responsibly and Professionally Invigorating Development Act (RAPID Act, H.R. 4078),** introduced by Rep. Tim Griffin. *Passed the House of Representatives by a 245-172 vote.* Provisions contained in the House bill come from Senate bills introduced by Senators Grassley, Mike Lee, Ron Johnson, and David Vitter. No Senate companion bill has been introduced. Among other things, this comprehensive bill would:

    - Streamline the permit process for infrastructure projects so that federal agencies must concurrently, as opposed to sequentially, review proposed projects; and

    - Limit the time for legal challenges to infrastructure projects to 180 days.

3. **Sunshine for Regulatory Decrees and Settlements Act (H.R. 3862/S. 3382),** introduced by Rep. Ben Quayle and Senator Chuck Grassley. *Passed the House of Representatives as part of the Red Tape Reduction and Small Business Job Creation Act.* Among other things, the bill would:

    - Provide better notification to the public of proposed settlement and decree agreements;

    - Require that agencies take public comments on settlement and decree agreements before they have been entered with the court; and

    - Make it easier for affected parties to intervene in settlement and decree agreement negotiations.

Moving Forward:

For decades federal agencies have gained tremendous power at the expense of the American people. Under the Obama Administration, this process has greatly accelerated to unprecedented levels. At the same time liberal activist groups have taken advantage of this expansion of agency power to successfully push forward their agenda.

Unless Congress reasserts its authority, federal agencies will continue to expand job-crushing red tape on small business owners and job creators.

Congress, as the elected representatives of the people, simply needs to reassert its constitutional role as the lawmaking authority to bring balance back to our system of government.

Unless we pass reasonable reforms that restore our system of checks and balances, federal agencies will continue to expand their authority further into the daily lives of Americans.

Congress needs to pass a series of reforms that will restore this balance. Three legislative vehicles have passed the House of Representatives during this Congress that will restore this balance. Many of these bills have Senate sponsors, and are ideas that have been championed in the Senate in other legislation. They can be modified or improved if that is deemed necessary, but the ultimate goals that these reforms address must be achieved.

Regardless of a divided Congress, these reforms must be at the top of our short term agenda. These reforms must pass immediately because we need to ensure that Congress can regain control over the regulatory process as it fights to create jobs.

There are many ways to achieve regulatory reform. Below are some selected examples of other must pass bills introduced in the 112th Congress that also have important provisions that achieve regulatory reform:

1. **S. 299/H.R. 10 – The Regulations from the Executive in Need of Scrutiny (REINS) Act**: This bill would mandate that Congress approve any major agency rule that has an annual economic impact of $100 million or more in order for the rule to go into effect. Sponsors: Sen. Rand Paul (R-KY), Rep. Geoff Davis (R-KY)

2. **S. 1061/H.R. 1996 - The Government Litigation Savings Act**: This bill would reform the Equal Access to Justice Act (EAJA) by disallowing the reimbursement of attorney's fees and costs for large, deep-pocketed special interests when they repeatedly sue the federal government. In accordance with Congressional intent, the bill retains federal reimbursement for individuals, small businesses, veterans and others who must fight in court against a wrongful government action. By eliminating taxpayer funded reimbursement of attorney's fees for wealthy special interest groups, the legislation will help eliminate repeated, procedural lawsuits that grind

the work of land managers to a halt. Sponsors: Sen. John Barrasso (R-WY), Rep. Cynthia Lummis (R-WY)

3. **S. 706/H.R. 1287- 3-D, Domestic Jobs, Domestic Energy, and Deficit Reduction Act of 2011**: This bill, along with stimulating important energy projects, would establish a reasonable time frame on the review process for energy projects, as well as limit the reimbursements from the federal government to groups for filing claims against domestic businesses. Sponsors: Sen. David Vitter (R-LA), Rep. Rob Bishop (R-UT)

4. **S.1292/H.R. 1872 - Employment Protection Act of 2011**: This bill would require EPA to analyze the impact on employment levels and economic activity, disaggregated by state, before promulgating any regulation or other requirement, issuing any policy statement, guidance document, endangerment finding, or denying any permit. Each analysis is required to include a description of estimated job losses and decreased economic activity due to the denial of a permit, including any permit denied under the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.). Sponsors: Sen. Pat Toomey (R-PA), Rep. Shelley Moore Capito (R-WV)