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CONGRESSIONAL TESTIMONY

**The Views of the Administration on
Regulatory Reform: An Update**

**Testimony before the
Committee on Energy and Commerce,
Subcommittee on Oversight and Investigations
United States House of Representatives**

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Chairman Stearns, Ranking Member DeGette, and members of the Subcommittee, thank you for the opportunity to testify today on this important topic.

My name is James Gattuso. I am a Senior Research Fellow in Regulatory Policy at The Heritage Foundation. The views I express in this testimony are my own, and should not be construed as representing any official position of The Heritage Foundation.

Four months ago, the President issued an Executive Order instructing all executive branch agencies to submit plans for reviewing regulations on their books, a process aimed at identifying outdated and unnecessary rules. Last week, OIRA Administrator Cass Sunstein reported on the initial progress of that review at the various agencies. His report was encouraging, as agencies have identified a substantial number of obsolete and unnecessarily costly regulations. The Administration, and Administrator Sunstein, should be commended for their efforts.

At the same time, the reforms proposed so far constitute only a very small step toward the roll back of red tape that the American economy needs. Much more substantial reform is required.

This is not a new issue. The burden of regulation has been steadily increasing over the past three decades, through Republican as well as Democratic administrations. During the present Administration, however, the rate of increase has reached unprecedented levels. According to figures compiled by The Heritage Foundation, based on data provided by the Government Accountability Office, federal agencies promulgated an unprecedented 43 major

regulations in FY 2010 alone, imposing annual costs – as calculated by the regulating agencies themselves – of at least \$28 billion dollars¹.

Fifteen of the 43 major rules issued during the fiscal year involved financial regulation. Another five stem from the Patient Protection and Affordable Care Act adopted by Congress in early 2010. Ten others came from the Environmental Protection Agency, including the first mandatory reporting of “greenhouse gas” emissions and new automotive fuel economy standards (adopted jointly with the National Highway Traffic Safety Administration).

During the same period, only three major rulemakings were completed which reduced burdens, with a total calculated savings of about \$1.5 billion. While steps to reduce burdens are, unfortunately, almost always outnumbered by those that impose new burdens, this was lower than the historical average.

It is in this context that President Obama launched his regulatory review initiative. In a *Wall Street Journal* opinion piece, the President acknowledged the problems of overregulation, noting that sometimes “rules have gotten out of balance, placing unreasonable burdens on business—burdens that have had a chilling effect on growth and jobs.” While stressing that he would not back away from regulating where necessary, he stated that “we are also making it our mission to root out regulations that conflict, that are not worth the cost, or that are just plain dumb.”

To address the issue, the President promised a “government-wide review” of rules. This was a welcome step, although the actual executive order was short on details. Rather than require agencies to take

¹ James L. Gattuso, Diane Katz and Stephen A. Keen, “Red Tape Rising: Obama’s Torrent of New Regulation,” Heritage Foundation Backgrounder No. 2482, Oct. 26, 2010.

specific steps to modify or eliminate problematic rules, it simply required agencies to create a process for doing so. This was hardly new or groundbreaking. In fact, agencies have been required to prepare such plans since 1993, under President Clinton's executive order on regulatory review. There is little evidence that such plans have had any impact.

Moreover, the Obama initiative was hardly "government-wide." It excluded independent agencies such as the Federal Communications Commission, the Securities and Exchange Commission, and the new Consumer Financial Protection Bureau. In so doing, the President excluded from scrutiny many of the largest producers of red tape.

Despite these limitations, the initiative has, as reported by OIRA Administrator Sunstein, had some meaningful results. Although not specifically required to do so, many agencies identified specific regulatory changes to be made. Among these:

- Modification of an EPA rule that defined milk as an "oil", thus requiring milk spillages at dairies to be treated as hazardous oil spills. Exempting milk from the rule will save dairies some \$1.4 billion over the next ten years.
- Elimination of an EPA requirement that gas stations maintain gas vapor recovery systems, a requirement which is redundant with air pollution controls required on cars today. Estimated savings: \$67 million per year.
- Modification of Department of Transportation requirements that railroads maintain automated anti-collision systems to areas where it is actually needed. Savings: up to \$400 million in upfront costs.

- Elimination of some 1.9 million hours of Occupational Safety and Health Administration paperwork, saving businesses some \$40 million annually.
- Harmonization of OSHA hazard classification and labels with requirements in other countries, saving businesses some \$585 million per year.

Overall, executive branch agencies identified over a hundred possible rule changes, with potential savings in the billions. According to OIRA, possible reforms identified by EPA, DOT and DOL alone promise over \$1 billion in savings.

For an Administration that up until now had reduced regulation on virtually nothing, this agenda is significant. As encouraging is the Administration's explicit acknowledgment that regulations have costs, and that regulators must make time in their day to review the restrictions and mandates they have imposed, to determine if they are actually necessary and effective.

This fact may seem obvious, but it is not universally recognized. Some, for instance, have criticized the review process, expressing concern that efforts to eliminate unnecessary and ineffective rules will drain resources from efforts to write new rules. In other words, regulators can't be bothered to examine whether the rules they have imposed make sense, because they need to focus on writing even more rules. The Obama Administration seems to have rejected these voices for ever more regulation.

Still, it is too soon for Americans to breathe a collective sigh of regulatory relief. Many of the steps announced last week are the low hanging fruit of regulatory excesses which should have been plucked long

ago. For instance, the rules defining milk as a potentially dangerous oil had been in place since the 1970s, and a request to eliminate dairies from the regulations had been submitted to EPA as early as 2007. The fact that it took four years to accomplish is less a notable achievement than a sign of our broken regulatory system. Similarly, the problems with the anti-collision systems mandated by DOT have long been known. In fact, DOT was sued more than a year ago by the railroad industry over the issue. DOT only committed to reforming the mandates last March, as part of a settlement of that lawsuit.

Many more actions are merely suggestions for change at a later date. For instance, only two rule changes have actually been finalized by the EPA. Of the 31 other reforms identified in the EPA's plan, sixteen are "early actions" that may lead to regulatory change in the near future, and 15 are "longer-term actions" that officials have simply marked for a closer look.

Moreover, these proposed regulatory rollbacks are far exceeded by new regulations which have been or will be promulgated. Thus, while the \$1 billion in estimated savings from EPA, Transportation and Labor is significant, nearly a dozen new rules costing more than \$1 billion each have been adopted in the last two years, swamping the savings identified in the review initiative. And more are in the pipeline. Until the torrent of new regulations is stopped, or at least narrowed, net regulatory burdens will continue to increase.

Help is needed from Congress as well. There are several steps that legislators can take to improve retrospective review of rules, and to ensure that new rules are necessary and effective. Among these:

1. Establish a sunset date for federal regulations. Even the best plans for periodic review of rules will fall short if there is no consequence for an agency that fails to adequately scrutinize the

regulations it has imposed. The natural bureaucratic tendency is to leave old rules in place, even if they have outlived their usefulness. To ensure that substantive review occurs, regulations should automatically expire if not explicitly reaffirmed by the agency. This re-affirmation would be subject to the normal appeals process in the courts for new rules, to ensure that the renewal is not arbitrary or capricious.

2. Create a Congressional Office of Regulatory Analysis. Congress needs the capability to review existing and proposed rules independently, without reliance on OMB or the agencies. A Congressional Office of Regulatory Analysis, modeled on the Congressional Budget Office, would provide an important backstop to, and check on, the executive branch's regulatory policy.

Such an office would also help Congress better evaluate the regulatory consequences of legislation it enacts. While it is easy to blame regulators for rulemaking excess, much of the problem stems from overly expansive or badly defined statutes. A congressional office to review such legislation before adoption would help address the problem.

3. Require congressional approval of major regulations that place new burdens on the private sector. Under the 1996 Congressional Review Act, Congress has the means to veto new regulations from agencies. To date, however, that authority has been used successfully only once. Under legislation introduced in the House by Congressman Geoff Davis (H.R. 10) and in the Senate by Senator Rand Paul (S. 299), the review process would be strengthened by requiring congressional approval before any major regulation takes effect. Such a system would ensure a congressional check on regulators, as well as ensure the accountability of Congress itself.

The results so far from the President's regulatory initiative are encouraging. The Administration – and especially OIRA – deserves credit for undertaking a review of federal rules, and identifying regulations that are costly and unnecessary. Yet these are only small and tentative steps on a very long road.

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