

“The Views of the Administration on Regulatory Reform: An Update”
Summary of Testimony of William L. Kovacs, U.S. Chamber of Commerce

1. Executive Order 13563, which calls on agencies to eliminate duplicative, outdated or unnecessary rules, is a positive first step, and it now appears that even the President is committed to addressing the regulatory state. Congress should not let this opportunity pass. But achieving real reform will require more aggressive action.
2. The Administrative Procedure Act (APA), enacted in 1946, requires agencies to regulate openly, with notice to and comment from the public, and subject to judicial review. Over time, the APA’s procedural protections grew in importance as Congress passed vague laws delegating agencies with ever more expansive power. However, increased judicial deference to agency decisions and Congress’s general abdication of its oversight authority combined to limit the operational checks on agencies’ regulatory power. As a result, federal agencies can now use the “legislate by regulation” and possess legislative power nearly equal to Congress.
3. There have been roughly 170,000 regulations issued since the mid-1970s. The vast majority of these “keep the lights on” and need not be disturbed, save for periodic reviews along the lines of OIRA’s current look-back initiative—for which the Administration should be commended, as this is the first time since look-backs were mandated by Congress in 1980 that a President has actually conducted one. However, the problem seems to be that, despite a relatively stable number of new general regulations issued annually, the number of *economically significant* regulations—*i.e.*, those costing the regulated community more than \$100 million—has increased substantially. These huge, complex, costly rulemakings should be the focus of any oversight, and the Administration’s look-back plan fails in this respect.
4. Congress has tried over the years to enact safeguards against the type of one-sided, economically-tone-deaf regulations that are now being issued. It put into place laws like the Regulatory Flexibility Act, the Information Quality Act, the Unfunded Mandates Reform Act, and job impact evaluation requirements like Section 321 of the Clean Air Act. However, agencies have become so skilled at their own regulatory procedures that they routinely ignore these requirements or find ways to legally circumvent them. The most recent example is “Sue and Settle Rulemaking,” responsible for over 30 of EPA’s economically significant rules. Sue and Settle Rulemakings occur when EPA initiates a rulemaking to settle a lawsuit by an environmental group. When questioned about the scope or rationale for the rulemaking by Congress, EPA simply explains that it is bound by a court order to move forward with the regulation. What is missing from the story, however, is the fact that EPA would not be bound by the court order if it simply chose to defend the case.
5. Congress can restore balance to the regulatory process by taking such steps as: passing the “Regulations from the Executive In Need of Scrutiny (REINS) Act;” requiring a formal rulemaking process for “super-major” rules; using the OSHA hybrid rulemaking model to give interested parties a chance to question agencies about proposed rules; requiring agencies to meet a “substantial evidence” standard for economically significant rules, rules containing novel concepts of law, and significant guidance; and providing private rights of action for persons affected by agency non-compliance with existing statutory safeguards such as the Information Quality Act.



Statement of the U.S. Chamber of Commerce

ON: THE VIEWS OF THE ADMINISTRATION ON
REGULATORY REFORM: AN UPDATE

TO: HOUSE COMMITTEE ON ENERGY AND
COMMERCE, SUBCOMMITTEE ON OVERSIGHT
AND INVESTIGATIONS

BY: WILLIAM L. KOVACS
SENIOR VICE PRESIDENT, ENVIRONMENT,
TECHNOLOGY AND REGULATORY AFFAIRS

DATE: JUNE 3, 2011

The Chamber's mission is to advance human progress through an economic, political and social system based on individual freedom, incentive, initiative, opportunity and responsibility.

**BEFORE THE COMMITTEE ON ENERGY AND COMMERCE
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS
OF THE U.S. HOUSE OF REPRESENTATIVES**

“The Views of the Administration on Regulatory Reform: An Update”

**Testimony of William L. Kovacs
Senior Vice President, Environment, Technology & Regulatory Affairs
U.S. Chamber of Commerce**

June 3, 2011

Good morning, Chairman Stearns, Ranking Member DeGette, and members of the Subcommittee on Investigations and Oversight. My name is William L. Kovacs and I am senior vice president for Environment, Technology and Regulatory Affairs at the U.S. Chamber of Commerce. The Chamber is the world’s largest business federation, representing the interests of more than three million businesses and organizations of every size, sector, and region. You have asked me to come before the Subcommittee today to discuss how the Office of Information and Regulatory Affairs (OIRA) is implementing Executive Order 13563 on regulatory reform. On behalf of the Chamber and its members, I thank you for the opportunity to testify here today.

On January 18, 2011, President Obama issued Executive Order 13563, with the goal of improving regulation and regulatory review. OIRA then commenced a four-month review designed to identify existing regulations “that are out-of-date, unnecessary, excessively burdensome, or in conflict with other rules.” The results of this look-back were released last week, and it appears the Administration has made some commonsense recommendations that will save businesses some time, money, headaches, and resources. The Chamber applauds the President and OIRA for taking an important first step to address the bloated regulatory state. However, as my testimony will show, this first step is not nearly enough.

The very first sentence of Article I of the U.S. Constitution reads: “All legislative powers herein granted shall be vested in a Congress of the United States.” As any elementary school student knows, the Congress makes the nation’s laws, and the Executive Branch carries them out. Over time, however, this separation of powers has eroded to such an extent that federal agencies can now use the regulatory process to “legislate by regulation” and possess legislative power nearly equal to that of Congress.

Regulations are a necessary part of a complex society. But an unbalanced regulatory process has led to an unprecedented increase in major, economically significant regulations, some of which are harming the economy and inhibiting job creation, and to erosion of the carefully calibrated constitutional system of checks and balances that is the foundation for our system of government. Therefore, the Chamber supports efforts to reform the regulatory process and make it more effective and accountable to the American people. My testimony will analyze what the Chamber

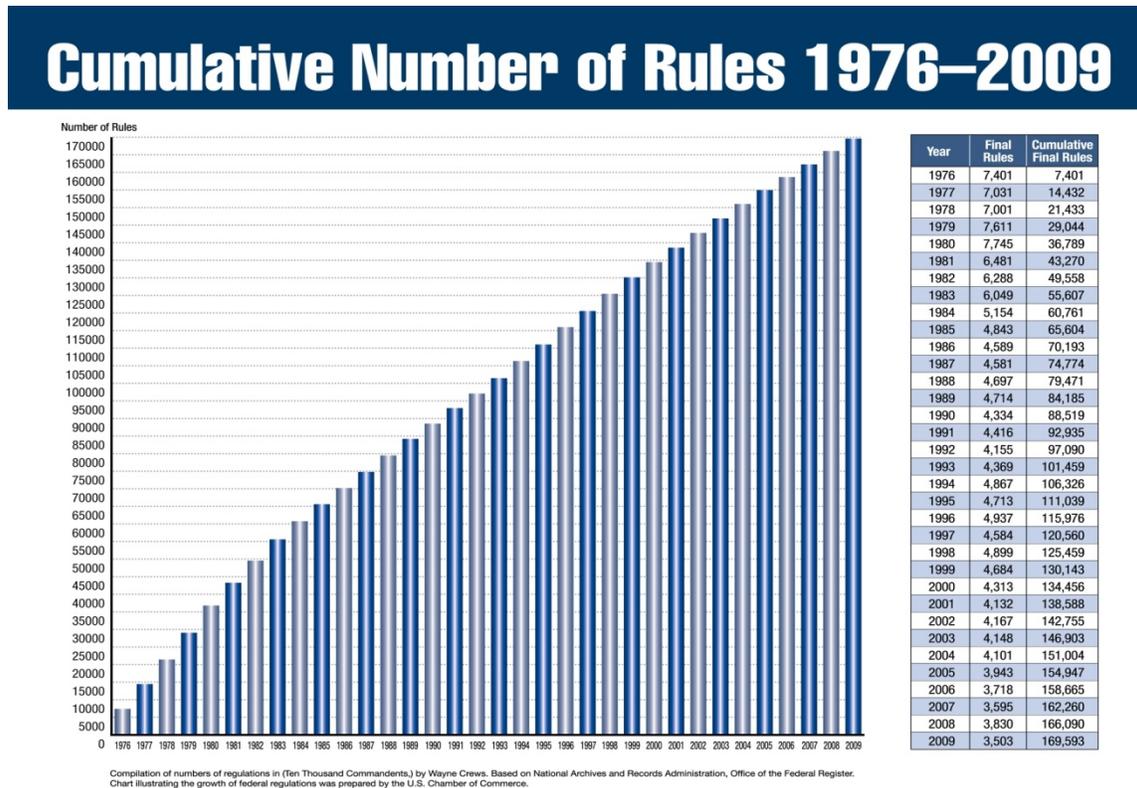
believes are the true causes of the regulatory problem, evaluate the response to date, and propose substantive measures to restore proper checks and balances between the Legislative and Executive Branches of our government.

I. Overview of Regulatory Reform

A. Number and Scope of Regulations

The U.S. Small Business Administration estimates that the overall cost of regulations to the United States is as high as \$1.75 trillion annually.¹ Regulations cost \$8,086 per employee annually and impose an average of \$10,585 on small businesses.² This almost equals the amount of taxes collected by the federal government: FY2009 gross individual income tax collections (before refunds) were \$1.18 trillion, gross corporate income tax collections were \$225.5 billion, gross employment tax collections were \$858.2 billion, and combined excise, gift and estate tax collections were \$71.3 billion.

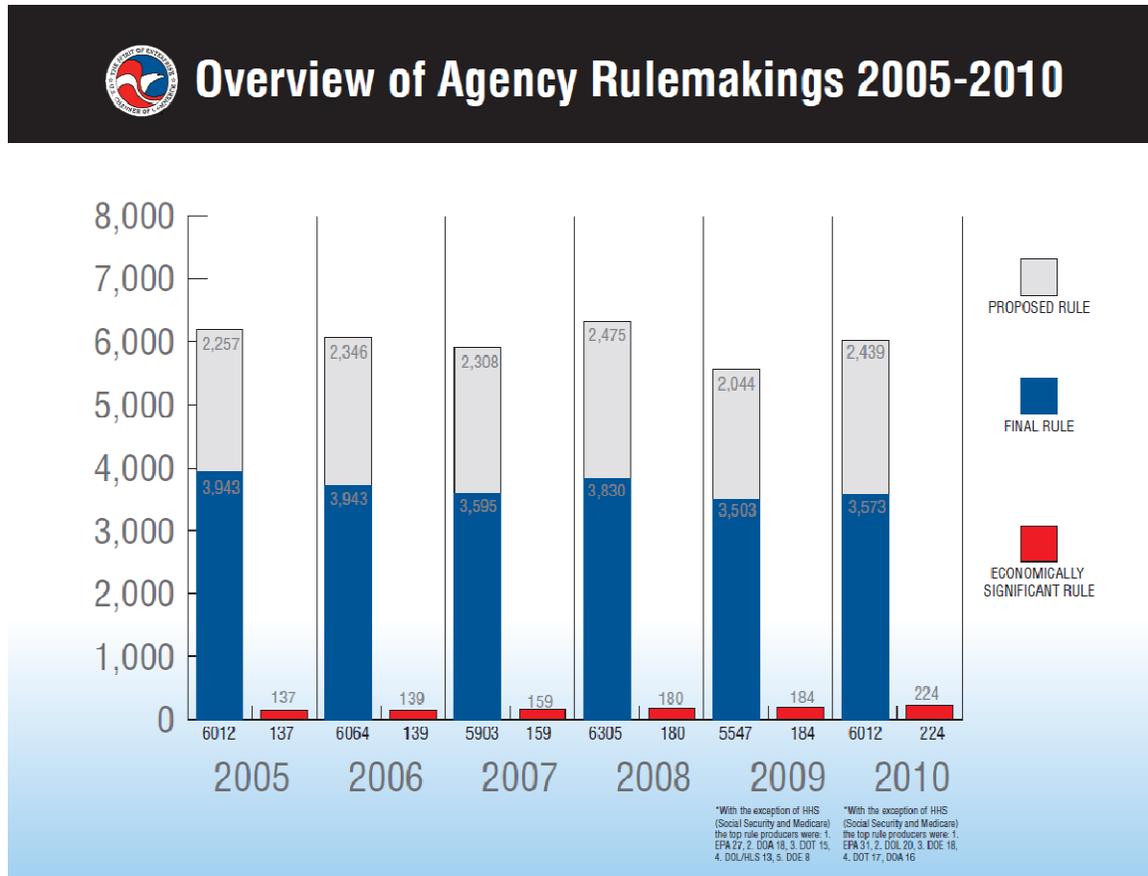
This \$1.75 trillion regulatory cost is the result of the accretion of roughly 170,000 individual regulations over the past four decades:



¹ “The Impact of Regulatory Costs on Small Firms,” Nicole V. Crain and W. Mark Crain, analysis performed for the Small Business Administration Office of Advocacy, September 2010, *available at* <http://archive.sba.gov/advo/research/rs371tot.pdf>.

² *Id.*

The Chamber believes the sheer number of regulations, though staggering, is not necessarily the problem that calls most for immediate attention, nor is it the reason why bipartisan concerns about the integrity of the regulatory process have intensified in recent years. Rather, the key problem is that the number of *economically significant* regulations—*i.e.*, those costing the businesses, consumers and the economy more than \$100 million—has increased substantially. As the chart below shows, the number of economically significant rules issued each year has increased more than 60 percent over the past five years, from 137 to 224:



Nowhere is this problem more pronounced than at the Environmental Protection Agency (EPA). EPA has garnered significant attention in recent years by issuing a series of one-sided, politically-charged regulations that are intended to take the place of legislation that cannot achieve a consensus in the Congress. From greenhouse gases to Clean Water Act jurisdiction to chemical regulation, EPA has not been shy about using regulations to impose broad mandates and restrictions so controversial that they could not pass even the heavily-Democratic 111th Congress.

As the chart below shows, the reasons for economically significant rulemakings vary from agency to agency:

Economically Significant Rules 1997–2010

Agency	Economically Significant Total Rules 1997-2010	Spending Rules (1)	Commerce Rules (2)	Commerce Rules/Judicial Deadline (3)	Commerce Rules/Statutory Deadline (4)
Agriculture	85	51	34	0	9
HHS	187	122	65	0	16
Interior	22	1	21	0	0
Labor	33	5	28	0	5
EPA	75	0	75	36	15

1. “Spending” rules involve the exercise of spending authority (e.g. Medicare reimbursement, disaster relief, grants).
2. “Commerce” rules directly regulate commerce or behavior (e.g. emissions limits, food safety standards).
3. “Commerce Rules/Judicial Deadline” are rules OIRA notes as subject to a specific judicial action-forcing deadline.
4. “Commerce Rules/Statutory Deadline” are rules OIRA notes as subject to a specific statutory action-forcing deadline.

OIRA website: www.reginfo.gov

EPA appears to be an outlier among the five agencies surveyed above: more than any other agency, EPA is “forced” to act, either by court order or statutory requirement. Most troubling is that EPA is the only agency that initiates rulemakings (36 by the Chamber’s count) by what is commonly referred to as “Sue and Settle Rulemaking.”

Sue and Settle Rulemakings occur when EPA initiates a rulemaking to settle a lawsuit by an environmental group. When questioned about the scope or rationale for the rulemaking by Congress, EPA simply explains that it is bound by a court order to move forward with the regulation. What is missing from the story, however, is the fact that EPA would not be bound by the court order if it simply chose to litigate. In recent years, Sue and Settle Rulemaking has resulted in several of the most controversial major rulemakings out of EPA in recent years, including: New Source Performance Standards (NSPS) for greenhouse gas emissions from electric utilities and refineries; numeric nutrient criteria for the State of Florida; revisions to the Definition of Solid Waste under RCRA; NESHAP for cement kilns; Clean Water Act guidance for mountaintop removal mining permits; the California Waiver; the Stream Buffer Zone Rule; multi-industry Clean Air Act Section 112 air toxics rules; Ozone NAAQS reconsideration; Clean Air Act regulations on oil and gas drilling operations; and EPA’s proposal to regulate

greenhouse gases under the Clean Water Act. Because Sue and Settle Rulemakings occur as a result of EPA's settlement with an environmental group, the terms of the settlement are often one-sided and give little consideration to the industry sector(s) that will be covered by the new regulations.

B. How Regulations Stop Progress

The cumulative impact of regulatory action can be overwhelming: agencies literally have the power to decide the fate of firms and entire industries. This recently happened for two power plants: Portland Gas & Electric's Boardman coal-fired power plant in Oregon, and Exelon Corporation's Oyster Creek Nuclear Generating Station in New Jersey. In both cases, the utility was forced to choose between installing several hundred million dollars' worth of pollution controls to comply with EPA regulations (regional haze at Boardman, cooling water intake structures at Oyster Creek), or simply shut down early. In both cases, the utility chose to shut down. This is a highly disturbing trend, and one that will only continue in 2011 with the issuance of even more major rules.

In addition, the onslaught of new requirements is giving "Not In My Back Yard" (NIMBY) activists even more tools to stop economic development. The Chamber's *Project No Project* Web site chronicles 351 state-level projects in 49 states that have been stopped, stalled, or outright killed due to NIMBY activism, a broken permitting process and a system that allows limitless challenges by opponents of development. Results of the assessment are compiled at <http://www.projectnoproject.com>, which serves as a web-based project inventory. The purpose of the *Project No Project* initiative is to enable the Chamber to understand potential impacts of serious project impediments on our nation's economic development prospects.

The Chamber commissioned a first-of-its kind economic study to examine the lost economic value and jobs foregone by not building these 351 projects. The study, *Progress Denied: The Potential Economic Impact of Permitting Challenges Facing Proposed Energy Projects*, produced by Steve Pociask of TeleNomic Research, LLC and Joseph P. Fuhr, Jr. of Widener University, found that successful construction of the 351 projects identified in the Project No Project inventory could produce a \$1.1 trillion short-term boost to the economy and create 1.9 million jobs annually. Moreover, these facilities, once constructed, continue to generate jobs, because they operate for years or even decades. Based on their analysis, Pociask and Fuhr estimate that, in aggregate, each year the operation of these projects could generate \$145 billion in economic benefits and involve 791,000 jobs. While it is unreasonable to think that all 351 projects would be constructed, even a subset of the projects would yield major value. For instance, Pociask and Fuhr estimate that the construction of only the largest project in each state would generate \$449 billion in economic value and 572,000 annual jobs.

The chart below illustrates the diversity of the energy projects impacted by a broken regulatory process. *Project No Project* proves the saying that it is just as hard to site a wind farm in the U.S. as it is a coal-fired power plant.



The best way to fix the project-level regulatory impediments that developers face is to fix the federal regulatory process that places these tools into NIMBY toolbelts. And that begins by requiring agencies to follow the laws that require them to consider jobs and economic impacts of their regulations.

C. Many Statutory Safeguards to Limit Bad Regulation are Not Used by Agencies

The Congress has long recognized the challenges posed by the power of Executive Branch agencies. Therefore, it has repeatedly attempted to create statutory safeguards to ensure the regulatory state is transparent and accountable, and to ensure agency power is properly cabined within appropriate constitutional and statutory limits. For example, in 1946 Congress enacted the Administrative Procedure Act (APA) requiring agencies to regulate openly and with notice to and comment from the public, and subject to judicial review. Over time, the procedural protections in the APA grew in importance as Congress passed vague laws delegating agencies with ever more expansive power. However, increased judicial deference to agency decisions and Congress’s

general abdication of its oversight authority combined to severely limit the operational checks on the regulatory power of federal agencies.

By the late 1970s, it had become clear that the delegation of congressional authority to the agencies to “fill in the legislative blanks,” the lack of congressional oversight over the agencies, and judicial deference were fundamentally altering the traditional balance between the legislative and executive branches of government. Thus, in 1980 Congress began enacting laws to restore the balance and to check executive power.

One of those laws, the Regulatory Flexibility Act, required agencies to periodically review rules “to determine whether such rules should be continued without change, or should be amended or rescinded” in order to minimize any significant economic activity of the rules upon a substantial number of small businesses.³ However, six administrations and almost 30 years passed before this provision of law was implemented by the Executive Branch. President Obama and Administrator Sunstein of the Office of Information and Regulatory Affairs should be applauded for finally implementing this measure.

Congress has repeatedly attempted over the years to rein in the Executive Branch agencies but it would be an understatement to assert nothing has worked. Agencies are just too skilled at manipulating the regulatory system. Some of the laws passed by Congress in an attempt to bring transparency and accountability to the process include:

i. The Unfunded Mandates Reform Act of 1995 (UMRA)⁴

UMRA was designed to restrain the imposition of unfunded federal mandates on state, local, and tribal governments and the private sector, primarily by providing more information and focusing more attention on potential federal mandates in legislation and regulations. Before promulgating a final rule, UMRA requires agencies to undertake a qualitative and quantitative assessment of the anticipated costs and benefits of the Federal mandate, including costs and benefits and future compliance costs, and estimates of the effect of the rule on the national economy, such as the effect on productivity, economic growth, full employment, creation of productive jobs, and services (if and to the extent that the agency determines accurate estimates are feasible). For rules of over \$100 million in economic impact, UMRA requires the agency to identify and consider a “reasonable number” of regulatory alternatives from which the agency shall select the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. Alternatively, the head of the agency must publish with the final rule an explanation of why the least costly, most cost-effective or least burdensome method of achieving the rule’s objectives was not chosen.

A May 2004 GAO Report states, “[t]here is some evidence that the information provided under UMRA and the spotlight that information places on potential mandates

³ 5 U.S.C. §§ 601-612 (1980).

⁴ 2 U.S.C. §§ 658 and 1511, *et seq.*

may have helped to discourage or limit federal mandates. CBO's annual reports indicate that, at least with regard to the legislative process, UMRA sometimes does have such an indirect preventive effect."⁵ However, agencies proved adept at manipulating the process to avoid UMRA's requirements and in the absence of substantive judicial review persons affected by agency action lack any means to hold agencies to account for UMRA violations. According to GAO:

There are multiple ways that both statutes and final rules containing what affected parties perceive as 'unfunded mandates' can be enacted or published without being identified as federal mandates with costs or expenditures at or above the thresholds established in UMRA. Our review demonstrated that many statutes and final rules with potentially significant financial effects on nonfederal parties were enacted or published without being identified as federal mandates at or above UMRA's thresholds. Further, if judged solely by their financial consequences for nonfederal parties, there was little difference between some of these statutes and rules and the ones that had been identified as federal mandates with costs or expenditures exceeding UMRA's thresholds.⁶

Notwithstanding the many sound provisions of UMRA, there is no right to judicial review; therefore, the statute's requirements cannot be enforced.

ii. The Information Quality Act (IQA)⁷

The IQA was designed to impose greater transparency and improve the quality of agency information, especially with respect to non-regulatory information disseminated by administrative agencies with respect to scientific and statistical matters. It requires:

- Compliance with OMB's information quality guidelines that mandate transparency, full disclosure of all data and reports used to justify or formulate an agency position on a given topic, and full disclosure of all uncertainties or error sources so that a member of the public may evaluate and reproduce the results of an agency analysis or study.
- Use of the best available, peer-reviewed science and supporting studies conducted in accordance with sound and objective scientific practices and data collected by accepted methods or best available methods.
- For claims, statements or policies regarding human health or environmental risks, the agency must specify (1) each population addressed by any estimate of public health effects; (2) the expected risk or central estimate of risk for the specific populations; (3) each appropriate upper-bound or lower-bound estimate of risk; (4) each significant uncertainty identified in the process of the assessment of public health effects and studies that would assist in resolving the uncertainty; and

⁵ General Accountability Office, "Unfunded Mandates: Analysis of Reform Act Coverage," GAO-04-637 (May 2004).

⁶ *Id.*

⁷ 44 U.S.C. §§ 3504(d)(1), 3516.

- (5) peer-reviewed studies that support, are directly relevant to, or fail to support any estimate of public health effects and the methodology used to reconcile inconsistencies in the scientific data.
- A procedure to allow affected persons to “seek and obtain” correction or disclosure of information that fails OMB information quality requirements.

The IQA’s drafters intended agency actions under the IQA to be subject to normative APA judicial review, and at least two Courts of Appeal have indicated APA review is available for persons aggrieved by IQA violations. However, the bureaucracy has taken the position that there is no judicial review or remedy for IQA violations and one Court of Appeals has adopted this view. In other words, the federal government and one Circuit hold Congress passed IQA without creating any rights for persons harmed by agency violations of its provisions. Consequently, agencies fail to fully comply.

iii. The Paperwork Reduction Act of 1995 (PRA)⁸

The PRA was enacted to minimize compliance burdens and to “improve the quality and use of Federal information to strengthen decisionmaking, accountability, and openness in Government and society.” It requires agencies to: (1) minimize compliance burdens and consult with members of the public and affected agencies concerning each proposed collection of information; (2) solicit comment to evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (3) look back and evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; and (4) take steps to enhance the quality, utility, and clarity of the information to be collected and increase program efficiency and effectiveness.

However, a 2005 GAO report concluded a new approach was needed to reduce the burden imposed by the bureaucracy on the public.⁹ GAO noted a general lack of agency compliance, stating: “The additional comment period added in 1995 appears to have had limited effectiveness in obtaining the views of the public, and agencies are not directly consulting with affected parties as the act requires. Many factors have contributed to the current state of agency review processes, including lack of management support, weaknesses in OMB guidance, and insufficient agency attention to the requirements of the PRA and related guidance. Until these factors are addressed, OMB, federal agencies, and the public lack adequate assurance that government information collections are necessary and that they appropriately balance the resulting burden with the benefits of using the information collected.”

iv. Job Loss Analysis Provisions

Almost every major environmental law contains a provision similar to Section 321(a) of the Clean Air Act, which requires EPA to perform a continuing study of

⁸ 44 U.S.C. § 3501 *et seq.*

⁹ General Accountability Office, “Paperwork Reduction Act: New Approach May Be Needed to Reduce Government Burden on Public,” GAO-05-424 (May 2005).

the effect of its regulations on employment or the threat of job loss.¹⁰ Yet EPA rarely, if ever, performs such a study. In the case of greenhouse gas regulations, EPA has consistently refused to perform a Section 321 analysis, even in the face of massive Congressional scrutiny and warnings that the regulations will impact jobs.

D. The Administration’s Response To Date

Executive Order 13563 was a positive first step in addressing the regulatory problem. However, the look-back conducted by OIRA is something it should have been doing all along: as previously stated, Congress required periodic regulatory look-backs from federal agencies when it enacted Section 610 of the Regulatory Flexibility Act in 1980. And in the case of EPA, its look-back does little to nothing in the way of addressing the bulk of rulemakings of significant concern to the Chamber and its members.

In just the past two years, the Chamber’s members have sought our assistance to convince EPA to either withdraw or limit the economic impact of the following rules and guidance documents:

Boiler MACT	Endangerment	Ozone NAAQS	Transport Rule
Coal Ash	Auto GHG Rule	Tailoring Rule	CWA Jurisdiction
Numeric Nutrients	Texas Air Permits	Lead Paint	Cement MACT
Utility MACT	Spruce Mine Veto	PM NAAQS	GHG NSPS
Chesapeake Bay	Johnson Memo	California Waiver	NSR Aggregation
HD/MD Truck GHG Rule	Cooling Water Intake Structures	RCRA Definition of Solid Waste	GHG Regulation under CWA

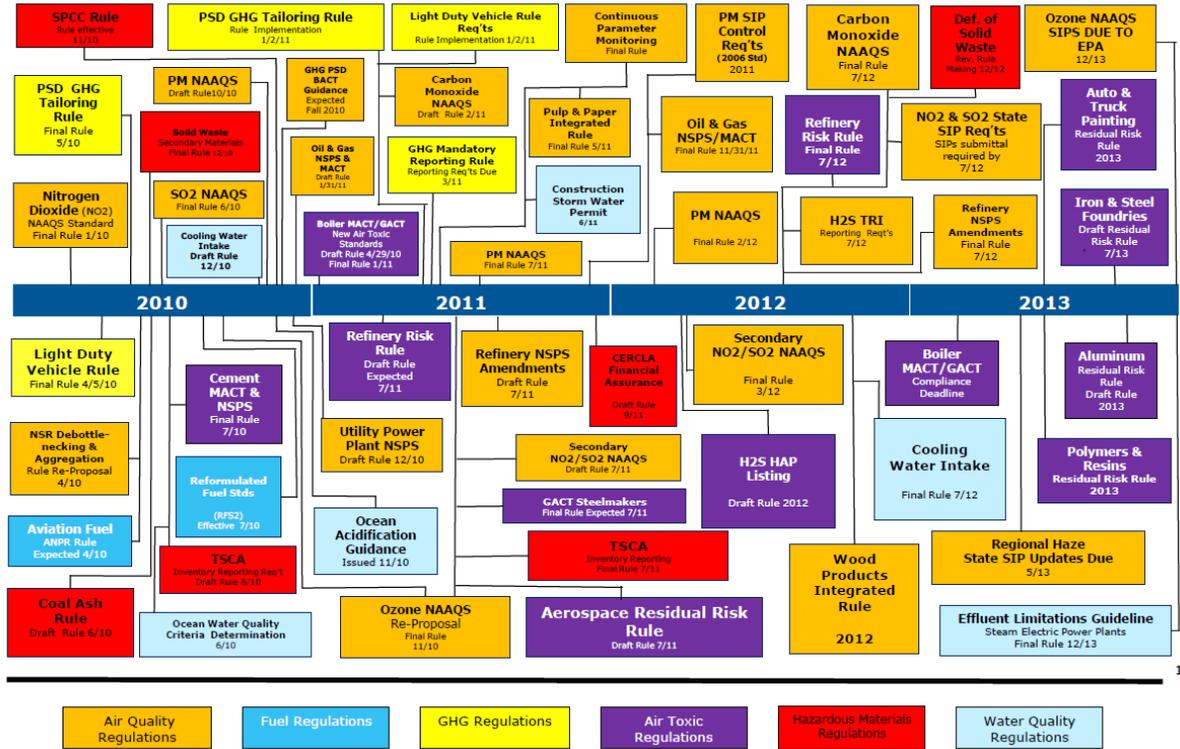
The costs to industry in these rulemakings are steep, and in virtually each case EPA has not adequately performed statutorily-required analyses of job impacts, economic impacts, small business impacts, and other burdens. Yet EPA’s look-back plan identifies only two of these rules—the lead paint rule and vehicle greenhouse gas regulations—and in both cases still fails to address the fundamental complaints made by industry.

What industry needed EPA to do under Executive Order 13563 was take a hard look at the 24 rules listed above and consider their actual impact. This includes statutorily-mandated job loss analyses that EPA has never completed, and economic impact analyses performed as the law requires. It includes compliance with the RFA, IQA, PRA and UMRA. EPA’s look-back report does not even ponder the reasons why the agency failed to comply with these laws when promulgating the bulk of the 24 laws listed above, nor does it state whether the agency will comply with these laws going forward. It only provides procedures for long-term reviews of regulations that are in

¹⁰ 42 U.S.C. § 7621. The provision can also be found in the Clean Water Act (33 U.S.C. § 1367), Solid Waste Disposal Act (42 U.S.C. § 6971), Toxic Substances Control Act (15 U.S.C. § 2623), Powerplant and Industrial Fuel Use Act (42 U.S.C. § 8453), and the Comprehensive Environmental Response, Compensation and Liability Act (42 U.S.C. § 9610).

place, perhaps meaning that the only time we will truly learn the economic impact of EPA's regulations is after they have been in effect for many years.

Moreover, the 24 rules listed above are just a small subset of the much larger number of regulations coming out of EPA over the next few years that will impact the Chamber's members. Those are contained in the chart below:



There must be a balance between environmental protection and economic security. EPA talks repeatedly of trying to maintain this balance; however, all the evidence points to the opposite. The only way to rein EPA in is to make wholesale changes to the regulatory process.

II. How to Fix the Regulatory Process

A. **Focus on Economically Significant Regulations**

Executive Order 13563, which calls on agencies to eliminate duplicative, outdated or unnecessary rules, is a positive first step, and it now appears that even our President is committed to addressing the regulatory state. Congress should not let this opportunity pass. But achieving real reform will require Congress and the President to move beyond redundant, nonsensical regulations. To make a real impact, Congress should focus on economically significant rules and significant guidance documents. These rules and guidance documents have historically been defined as those likely to result in an annual effect on the economy of over \$100 million; lead to a major increase in costs or prices; raise

novel policy or legal issues; or have significant adverse effects on competition, employment, investment, productivity, innovation or on the ability of United States-based enterprises to compete with foreign-based enterprises. These are also the rules and guidance most likely to raise compelling federalism and constitutional separation of powers concerns. As the chart on the Overview of Agency Rulemakings 2005-2010 illustrates these economically significant regulations only comprise four percent of agency regulations but they are both the vast majority of economic impact, job destruction and are the rules that put the agencies into the legislative process.

B. Raise the Bar!

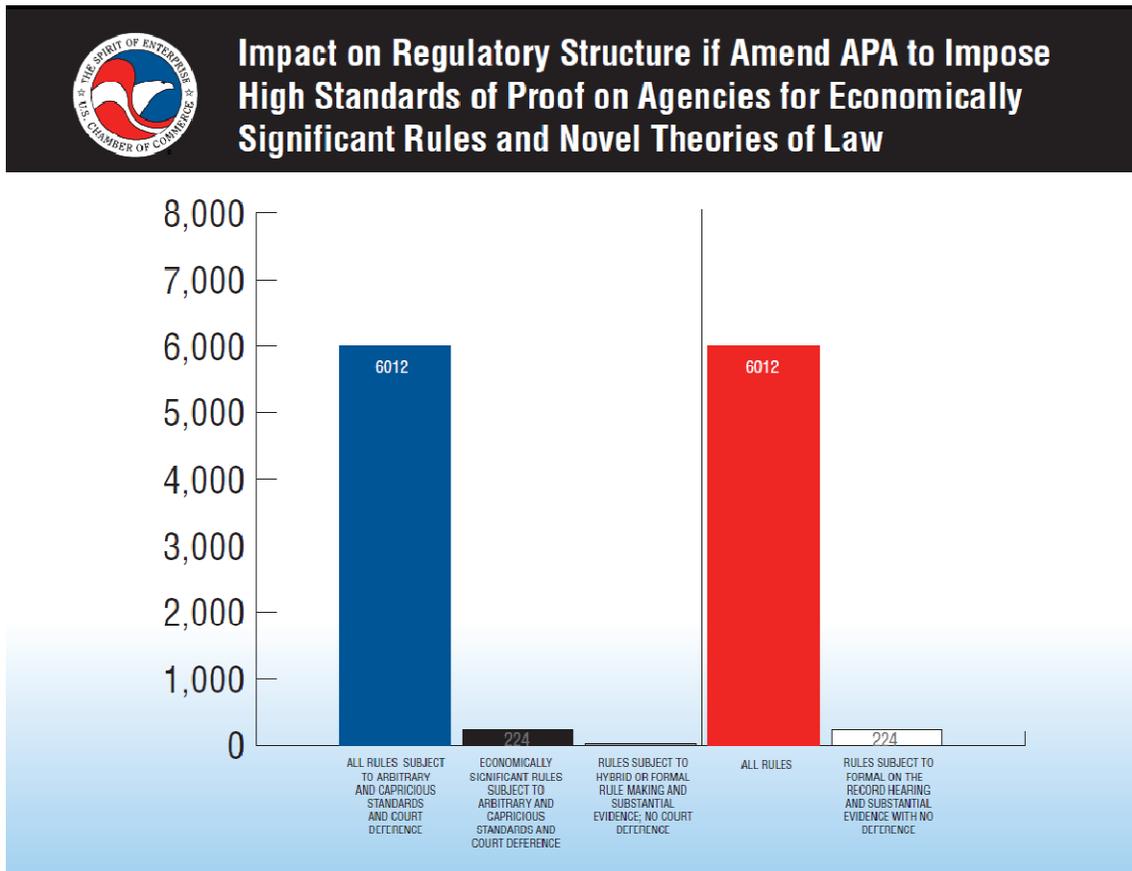
Currently, the same standard of review applies to both general regulations and economically significant regulations. However, given the size and scope of economically significant regulations, not to mention the need for public participation, the informal notice-and-comment rulemaking procedure simply does not work. It allows agencies to ignore the built-in statutory checks and balances and there is a lack of accountability because the courts provide substantial deference to the agencies. The Chamber recommends the following measures to restore balance to the regulatory process:

- The REINS Act. The Chamber supports H.R. 10 and S. 299, the “Regulations from the Executive In Need of Scrutiny (REINS) Act.” The REINS Act requires both houses of Congress to affirmatively approve, and the president to sign, any new “major rule”—i.e., a rule with a projected impact to the economy of over \$100 million—before it could become effective. The Chamber believes the REINS Act is an effective regulatory reform, which would improve Congressional oversight, increase the quality of agency rulemakings, and better ensure all branches of the Federal government are accountable. It restores to Congress the duty and obligation to make balancing decisions with respect to regulations. This is what the Constitution provides, and this is how the system ought to work.
- Require Formal Rulemaking for the “Super Rules”. Formal rulemaking under the APA means a quasi-judicial hearing with testimony under oath, depositions and cross-examination. The agency, as the rule’s proponent, carries the burden of proof by substantial evidence. “Substantial evidence” is enough relevant evidence for a reasonable person to conclude the record is adequate to support the proposed agency action. This is a more demanding test than the traditional “arbitrary and capricious” standard applied by courts to rules promulgated by informal rulemaking. The Chamber believes formal rulemaking is appropriate for the small category of “super rules” with significant economic impact and societal impact.
- Use the OSHA Hybrid Rulemaking Model to Give Interested Parties a Chance to Question Agencies about Proposed Rules. The APA generally provides for notice and comment (“informal”) or adjudicatory (“formal”) rulemaking. However, Congress created a unique “hybrid” rulemaking model for OSHA, allowing the agency to propose rules and standards via notice and comment but requiring an

informal hearing with cross-examination of the agency at a stakeholder’s request. The Chamber believes extending the OSHA hybrid approach to all major rules and guidance will promote transparency and promote regulatory quality by ensuring more rigorous internal and external review of agency actions.

- Require Agencies to Meet the “Substantial Evidence” Test for Economically Significant Rules, Rules Containing Novel Concepts and Significant Guidance. Currently, a party challenging a rule promulgated by informal rulemaking must demonstrate in court that the agency’s actions are contrary to law or “arbitrary and capricious.” Courts substantially defer to agencies under this test. The substantial evidence test obligates courts to take a harder look at agency findings. Among other things, we believe a harder look by the courts will force agencies to more carefully review major rules or guidance before they are proposed for public comment and should improve regulatory quality. Therefore, the Chamber believes that the APA and/or the Regulatory Flexibility Act should be amended by extending the substantial evidence test to all major rules and guidance.

Opponents of regulatory reform will claim that a substantial evidence test for economically significant rules and significant guidance will impose too high a burden on agencies. However, as the chart below demonstrates, it will only impact a very small portion—roughly 4 percent—of all regulations:



- Enforce provisions of existing environmental laws requiring EPA to consider jobs and economic impact. Section 312 of the Clean Air Act (42 U.S.C. § 7612) requires EPA to conduct a cost-benefit analysis for most major air rules. Section 317 (42 U.S.C. § 7617) requires economic impact assessments for most major air rules. And Section 321 (42 U.S.C. § 7621) requires the Administrator to do a continuing study of the effect of its regulations on employment or the threat of job loss. Identical provisions to Section 321 exist in most other environmental statutes, such as the Clean Water Act, Toxic Substances Control Act, the Solid Waste Disposal Act, and CERCLA. Yet EPA either flat-out ignores these requirements (as it did with Section 321 and its GHG rules), or it does such a poor job with the economic assessment and the underlying data that the result is misleading, usually overstating benefits and understating costs. The Chamber recommends requiring EPA to conduct these statutorily-required analyses for all major regulations. Moreover, the Chamber recommends preempting all EPA regulations issued in 2009 and 2010 that did not adequately comply with Sections 312, 317 and 321.
- Amend the Regulatory Flexibility Act to Require Cost-Benefit Estimates and Science Reviews by an Independent Third Party not Agency Staff. Many current laws and Executive Orders already require agencies to conduct cost-benefit estimates and science reviews. However, these estimates and reviews likely would be more accurate and more credible if conducted by an independent third party and not agency staff. Requiring cost-benefit estimates and science reviews to be conducted entirely by an independent third party would be an important check and balance on agency power and improve regulatory quality.
- Amend the Regulatory Flexibility Act to Consider “Indirect” Impacts. The Regulatory Flexibility Act requires agencies to determine if a rule will have a “significant economic impact on a substantial number of small entities.” If so, then the agency must explain why it has chosen this rule over other options. Due to a court decision, only the direct impact of a rule (i.e., cost of compliance) need be assessed. However, indirect costs such as litigation and enforcement risk and lost business opportunities ought to be accounted for as well. Therefore, the Chamber proposes amending the Act to include indirect impacts.
- Codify Executive Order 12866 including Guidance Documents. President Clinton issued E.O. 12866 requiring agencies considering new rules to identify and assess alternative forms of regulation, adopt the least burdensome regulatory alternative, use the best reasonably obtainable science, and highlight economic impact concerns, among other things, and then to submit major rules to OMB’s Office of Information and Regulatory Affairs (OIRA) for review. OIRA, in turn, was authorized to return regulatory proposals that failed to comply with the E.O. to the relevant agency for revision. President Bush amended E.O. 12866 to include guidance documents, to require best estimates of cumulative regulatory costs and benefits, and to require identification of market failures. President Obama repealed the Bush amendments. However, the Chamber believes E.O. 12866,

ideally including the Bush amendments, ought to be codified with a private right of action for persons affected by agency or OIRA non-compliance.

- Clarify that Information Quality Act Violations are Judicially Reviewable. The Information Quality Act requires agencies to disseminate information using sound scientific and statistical methods and to utilize the most current and high quality information. If agency rules are to successfully and efficiently manage a complex society these rules should be based on the most solid foundation of data, science, and statistics. Unfortunately, agencies take the position that IQA violations are not judicially reviewable. This undermines IQA's effectiveness and is contrary to controlling APA norms and original Congressional intent. The Chamber believes Congress should follow the recent appellate decisions and confirm that IQA violations are judicially reviewable and that IQA quality standards apply to all studies, statistics, and other information used to support promulgation of rules and guidance.

Thank you for the opportunity to testify today. I look forward to answering any questions you may have.