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Committee on Oversight and Government Reform

Darrell Issa (CA-49), Chairman

Broken Government: How the Administrative State has Broken President Obama's Promise of Regulatory Reform

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EXECUTIVE SUMMARY

In the wake of stagnant job creation, an unacceptably high unemployment rate and growing concern that our country is marching towards another recession, the House Committee on Oversight and Government is continuing its examination of regulations that are acting as impediments to job creation. Late last year, the Committee began the most expansive look in more than a decade at the impact that regulations were having on businesses – large and small – the result was input from more than 1,300 businesses and their representatives across the country.

The federal government plays a significant role in determining the environment in which job creators must navigate. Unfortunately, the Committee has found that the Obama Administration has created a regulatory environment that is suffocating America's entrepreneurs' ability to create jobs and grow businesses. The result has been a regulatory tsunami that has stifled productivity, wages, job creation and economic growth. This regulatory tsunami has caused job creators to lock down at a time when we need them to expand. The Committee has found that the problems created by this regulatory tsunami goes far beyond the cost of the regulations themselves, but also include breakdowns in the regulatory process itself that is having a severe impact on large and small businesses alike.

The report makes the following key findings:

- The Obama Administration has created a regulatory environment that is suffocating the ability of America's entrepreneurs to create jobs and grow businesses.

- The Obama Administration has presided over a regulatory expansion that has been negligent of its economic impact.

- There are 219 economically significant regulations in the pipeline, which if finalized, will impose costs of $100 million or more annually on the economy - that's a minimum of $219 billion over ten years.

- In total, the Obama Administration has imposed 75 new major regulations costing more than $380 billion over ten years.

- The regulatory process is broken, being manipulated and exploited in an effort to reward allies of the Obama Administration such as environmental groups, trial lawyers, and unions.

- The federal agency charged with serving as a watchdog over the regulatory process has failed to take meaningful action to address the breakdown in the regulatory development and implementation process.

- The Obama Administration has been a willing accomplice in the strategy advanced by outside interest groups to circumvent the oversight and accountability checks in the regulatory process. Essentially, regulatory agencies are avoiding meaningful scrutiny by employing numerous gimmicks by:

- Refusing to perform accurate cost-benefit analysis
- Overturning decades of precedent without justification
- Entering into sue and settle agreements
- Enacting policy changes through guidance documents
- Improperly issuing emergency rulemakings

- Examples Include:

  - The "sue-and-settle" approach taken by the EPA bypasses the proper rulemaking process and avoids basic principles of transparency and accountability. The removal of the opt-out provision in the EPA lead paint rule is a blatant example and has dire consequences for job creators.

  - The Obama Administration is abusing the emergency rulemaking process by issuing "interim final rules." In the case of the President's signature health care act, the Patient Protection and Affordable Care Act, vague definitions and lack of clarity are causing health plans to lose their grandfathered status and creating uncertainty for job creators.

  - Under the Obama Administration, guidance documents are being used to effect policy changes—which job creators view as having equal weight to regulations themselves. OIRA claims to review "significant guidance documents" but because these documents are not technically regulations, it is unclear what criteria OIRA is using.

  - An "enhanced review process" initiated by EPA of Clean Water Act Section 404 permits were initiated in violation of the Administrative Procedures Act.

  - The U.S. Department of Agriculture Grain Inspection, Packers, and Stockyards Administration (GIPSA) failed to conduct a proper economic analysis as required by Executive Order on a proposed rule projected to have a $1.64 billion impact on the beef, poultry and related sectors.

  - The SEC used a failed administrative process and neglected to consider the expected costs of the rule instituted as a result of Dodd-Frank. A subsequent D.C. Circuit Court ruling found that, "[SEC] inconsistently and opportunistically framed the costs and benefits of the rule; failed adequately to quantify the certain costs or to explain why those costs could not be quantified; neglected to support its predictive judgments; contradicted itself; and failed to respond to substantial problems raised by commentators." The court determined that "by ducking serious evaluation of [these] costs the SEC acted arbitrarily."

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I. INTRODUCTION

In January 2011, President Obama issued Executive Order 13563, *Improving Regulation and Regulatory Review*,[1] in an effort to review federal rules that "stifle job creation and make our economy less competitive."[2] He indicated that future regulations should promote public health and welfare, but also "promot[e] economic growth."[3] Similar rhetoric has continued in recent months, and the Obama Administration has pushed back against claims that businesses are facing a "regulatory tsunami."[4] Yet, contrary to the Administration's claims, the federal regulatory state continues to grow rapidly. The number of pages in the Federal Register is at an all-time high.[5] Pages devoted to final rules rose by 20 percent between 2009 and 2010, and proposed rules have increased from 2,044 in 2009 to 2,439 in 2010.[6] Further, of the 4,257 regulatory actions in the pipeline, 219 are considered economically significant, meaning they are estimated to impose a cost of $100 million or more on the economy.[7] By comparison, that is 28 more than this time last year, and 47 more than in 2009.[8] In total, the Obama Administration has imposed 75 new major regulations costing over $38 billion annually.[9] According to a report by the Heritage Foundation, "no other President has burdened businesses and individuals with a higher number and larger cost of regulations in a comparable time period."[10]

In addition, federal regulatory agency budgets are on the rise. Regulatory agencies have seen their budgets grow by 16 percent over the past three years.[11] *Investor's Business Daily* summarized it well when they reported that "[i]f the federal government's regulatory operation were a business, it would be one of the 50 biggest in the country in terms of revenues, and the third-largest in terms of employees, with more people working for it than McDonald's, Ford, Disney and Boeing combined."[12] As evidence, employment at regulatory agencies has climbed 13 percent since President Obama took office,[13] and the number of staff working on regulatory matters is on schedule to increase at a rate of 10,000 new regulatory employees per year in 2011 and 2012.[14] The number of full time regulatory employees is expected to reach an all-time high of 291,676 in 2012.[15] Meanwhile, since President Obama took office, private sector jobs have declined by 5.6 percent.[16]

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[1] Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 21, 2011).
[2] Barack Obama, *Toward a 21st-Century Regulatory System*, WALL ST. J., Jan. 18, 2011.
[3] *Id.*
[4] Cass Sunstein, *The Smart Approach to Reforming Regulations*, WASH. POST, June 30, 2011.
[5] Clyde Wayne Crews, Jr., Competitive Enterprise Institute, Ten Thousand Commandments2011: An Annual Snapshot of the Federal Regulatory State (2011).
[6] *Id.*
[7] Susan E. Dudley, *Don't Overstate Reg Re-examination*, POLITICO, Aug. 24, 2011.
[8] *Id.*
[9] James Gattuso & Diane Katz, Heritage Found., Red Tape Rising: A 2011 Mid-Year Report (2011).
[10] *Id.*
[11] John Merline, *Regulation Business, Jobs Booming Under Obama*, INVESTOR'S BUS. DAILY, Aug. 15, 2011.
[12] *Id.*
[13] *Id.*
[14] Geo. Wash. Center for Reg. Stud. and Wash. University's Weidenbaum Center on the Economy, Govt. and Public Policy, Fiscal Stalemate Reflected in Regulators' Budget: An Analysis of the U.S. Budget for Fiscal Years 2011 and 2012 (2011).
[15] *Id.*
[16] John Merline, *Regulation Business, Jobs Booming Under Obama*, INVESTOR'S BUS. DAILY, Aug. 15, 2011.

At a time when unemployment is hovering at 9.1 percent, these regulatory statistics create uncertainty and hinder job creation. Indeed, Cass Sunstein, President Obama's chief regulatory czar and the Administrator of the Office of Information and Regulatory Affairs (OIRA), articulated in a 2002 law review article that "expensive regulation may well increase prices, reduce wages, and increase unemployment (and hence poverty)."[17] A decade later, the problem persists, and paints a picture of an ever-expanding, ever-encroaching regulatory culture. "[U]reasonable government regulations" ranks as a top ten problem for small businesses, and 21 percent of these business owners identified government regulation as a critical problem blocking job creation.[18] While small businesses create two-thirds of the net new jobs in this country, those with less than 20 employees have shed more jobs than they have created every quarter but one since the second quarter of 2007.[19] This trend appears likely to continue as small businesses continue to be hesitant to hire.[20] Indeed, a recent Small Business Outlook Survey by the U.S. Chamber of Commerce showed that 70 percent of respondents said they do not plan to hire new employees next year, and nine percent will continue layoffs.

Against this backdrop, Administrator Sunstein recently declared that "with the introduction of the President's Executive Order, we now have the tools needed to maintain a smart and efficient regulatory framework" both for "the flow of new regulations and the stock of existing regulations."[21] Further, the President appears to believe that "if regulations are preceded by careful analysis, and subjected to public comment, they are less likely to be based on intuition and guesswork and more likely to be justified in light of a clear understanding of the likely consequences of alternative courses of action."[22] However, federal regulators are not adhering to the President's belief. This report highlights breakdowns in our regulatory system that thwarts the Administration's promises and has significant impact on economic growth and job creation.

Pursuant to President Obama's recent regulatory Executive Order and Executive Order 12866, executive branch agencies are to abide by a host of regulatory principles and perform a variety of analyses. OIRA, an agency within the Executive Office of the President, is to review draft proposed and final regulations and police these agencies to ensure they are meeting their regulatory requirements.[23] If OIRA believes an agency has failed to do so, it can question the agencies analyses or issue a "return letter." A "return letter" to an agency indicates that OIRA thinks the rule would benefit from further consideration and review by the agency.[24] Under the

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[17] Robert W. Hahn & Cass R. Sunstein, *A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis*, 150 U. PA. L. REV. 1489 (2002).
[18] National Federation of Independent Business, Government and Regulatory Reform, *available at* http://www.nfib.com/issues-elections/government-and-regulatory-reform (last visited Sept. 7, 2011).
[19] *Regulating Chaos: Finding Legislative Solutions to Benefit Jobs and the Economy: Hearing Before the Subcomm. On Environment and the Economy of the H. Comm. On Energy and Commerce* 112th Cong. (2011) (statement of Karen R. Harned, Executive Director, National Federation of Independent Business).
[20] U.S. Chamber of Commerce, Small Business Outlook Survey (April 2011).
[21] *Hearing Before the S. Comm. on Homeland Security and Governmental Affairs*, 112th Cong. (2011) (statement of Cass R. Sunstein, Administrator, Office of Information and Regulatory Affairs).
[22] Memorandum on Regulatory Flexibility, Small Business, and Job Creation, 76 Fed. Reg. 3827 (Jan. 18, 2011).
[23] Office of Management and Budget, Office of Information and Regulatory Affairs, Reginfo.gov FAQs, *available at* http://www.reginfo.gov/public/jsp/Utilities/faq.jsp (last visited Sept. 6, 2011).
[24] *Id.*

Obama Administration, prior to this month, OIRA had yet to issue a single return letter.[25] Yet, in Administrator Sunstein's previous scholarship, he recognized that "[they] should be issued in appropriate circumstances."[26] In light of the examples provided in this report, such limited action by OIRA could mean it is not up to the task of policing the vast regulatory state. Even more concerning, the report also includes instances where independent regulatory agencies, not subject to the executive orders or OIRA's oversight, have run afoul of E.O. 12866 in their regulatory actions.

In addition to the requirements of E.O. 12866, regulatory agencies are required to meet other statutory requirements. For instance, the Regulatory Flexibility Act (RFA) mandates agencies analyze the impact of regulations on small entities.[27] If the impact is likely to be significant on a substantial number of these entities, the agency is to seek less burdensome alternatives.[28] Further, the law requires the Environmental Protection Agency and the Department of Labor to conduct small business review panels to help agencies measure the impact of rules.[29] However, as this report documents, agencies are not fulfilling their obligations under the RFA.

Agencies have also skirted the regulatory process through "sue and settle" agreements, misuse of guidance documents, and abuse of emergency rulemaking process. "Sue and settle" agreements are legal settlements, often the result of a lawsuit brought by special interest groups that mandate subsequent regulatory action under a compressed timeline.[30] Rules issued in this manner are often unfair to job creators because they force specific agency action often desired by environmental groups, while denying other stakeholders a seat at the table. Guidance documents, while not legally binding or technically enforceable, are supposed to be issued only to clarify regulations already on the books. However, under this Administration, they are increasingly used to effect policy changes, and they often are as effective as regulations in changing behavior due to the weight agencies and the courts give them.[31] Accordingly, job creators feel forced to comply.

Finally, agencies often abuse the emergency rulemaking procedures provided for in the Administrative Procedures Act (APA).[32] The APA authorizes agencies to issue interim final and direct final rules under emergency conditions.[33] These rules are issued without the benefit of

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[25] *See* Office of Management and Budget, Office of Information and Regulatory Affairs, Reginfo.gov OIRA Returns Letters, *available at* http://www.reginfo.gov/public/do/eoReturnLetters (last visited Sept. 6, 2011).
[26] Robert W. Hahn & Cass R. Sunstein, *A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis*, 150 U. PA. L. REV. 1489 (2002).
[27] 5 U.S.C. § 603 (2010).
[28] *Id.*
[29] 5 U.S.C. § 609 (2010).
[30] *See* Press Release, Committee on Oversight and Government Reform, Issa: EPA Using "Sue and Settle" to Regulate Job Creators (Apr. 19, 2011).
[31] *See* Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 400 (2007) (noting that a guidance document "will, in practice, prompt a regulated entity to change its behavior" because "[t]he document still establishes the law for all those unwilling to pay the expense, of suffer the ill-will of challenging the agency in court." (internal citation omitted)).
[32] *See* Gen. Accounting Office, Federal Rulemaking: Agencies Often Published Final Actions Without Proposed Rules 16-18 (Aug. 1998).
[33] *Id.* at 5-7.

initial public comment, yet they are legally binding as of the date of publication. Often times the "emergency" is a merely an unrealistic deadline in a statute.[34] Abuse of the emergency procedures completely deprives the public and job creators of their right to provide the agency with feedback on the expected impact of the regulation before that regulation takes legal effect. In addition to these flaws outlined above, this report notes where the agencies have exceeded congressional intent. Ironically, while the President has admitted there are legitimate complaints about regulations and has pledged to "fix them,"[35] none of the regulations highlighted in this report have received serious scrutiny by this Administration.

Since January, the Committee has been engaged in rigorous oversight of burdensome regulations.[36] This report continues that effort. The rules discussed were brought to the Committee's attention through hearings, letters, and the website AmericanJobCreators.com; they are merely a sample of regulations that document inefficiencies in the regulatory system.

II. FLAWED ECONOMIC ANALYSIS

Pursuant to E.O. 12866, executive branch agencies are to provide an assessment of the potential costs and benefits, including reasonable alternatives, of regulations that the agency determines to be "significant."[37] A regulation, among other things, is considered "significant" if it may "adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities."[38] Subsets of these are "economically significant" regulations, those expected to have an annual effect on the economy of $100 million or more.[39] For all "economically significant" regulations, agencies are to conduct an even more robust and detailed cost-benefit analysis.[40] OIRA is required to review all "significant" regulations under E.O. 12866 and may prevent an agency from moving forward with a regulation if it determines that "the quality of the agency's analysis is inadequate or if the regulation is not justified by the analysis."[41] Further, OIRA may make its own determination that a regulation is "significant" if the agency fails to do so. The regulations below are examples of a clear failure by agencies to meet the requirements of E.O. 12866 and OIRA to properly police these agencies.

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[34] *Id.* at 17.
[35] *See, e.g.*, Roger Runningen, *Obama Says He's Identified Business Regulations for Elimination*, BLOOMBERG, May 12, 2011; Office of the Press Secretary, Remarks by the President to the Chamber of Commerce (Feb. 7, 2011), *available at* http://www.whitehouse.gov/the-press-office/2011/02/07/remarks-president-chamber-commerce.
[36] *See e.g.,* H. Oversight & Govt. Comm. Preliminary Staff Report, *Assessing Regulatory Impediments to Job Creation*, 112th Cong. (Feb. 9, 2011).
[37] Exec. Order No. 12866, 58 Fed. Reg. 51735 (Sept. 30, 1993).
[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] Office of Management and Budget, Office of Information and Regulatory Affairs, Reginfo.gov FAQs, *available at* http://www.reginfo.gov/public/jsp/Utilities/faq.jsp (last visited Sept. 6, 2011).

A. Grain Inspection, Packers, and Stockyards Administration Proposed Rule

i. Rule and Purpose

On June 22, 2010, the U.S. Department of Agriculture (USDA) Grain Inspection, Packers, and Stockyards Administration (GIPSA) proposed a rule pursuant to the Food, Conservation, and Energy Act of 2008 (Farm Bill) intended to "increase fairness in the marketing of livestock and poultry"[42] and "clarify conditions for industry compliance with the [Packers and Stockyards Act of 1921]."[43] More simply, the proposed rule is an attempt to regulate livestock marketing practices. This change has caused a significant amount of alarm in the agricultural sector because it could "dismantle the business models used by livestock producers, meat packers, and poultry processors" by making commonly used marketing agreements legally risky and subject to challenge by those who are not a party to the agreements.[44] As a result, these agreements would be less attractive to industry and lead to higher prices and fewer options for consumers.[45]

ii. Broken Process

Ranchers, livestock packers and producers, meat companies, as well as others in this community have expressed serious concerns with the development of this rule. These stakeholders argue that GIPSA has deliberately avoided conducting a meaningful cost-benefit analysis. Moreover, they argue GIPSA has not complied with the mandates of E.O. 12866 because the rule exceeds congressional authority and will encourage litigation.

In the first instance, GIPSA failed to conduct a proper economic analysis of the proposed rule in violation of E.O. 12866. Under E.O. 12866, agencies are to conduct a cost-benefit analysis in cases where the rule is determined to be "significant."[46] While GIPSA determined the rule to be "significant," it did not attempt to estimate the total of the costs or benefits of the rule.[47] Instead, GIPSA conducted a very minimal cost estimate of portions of the rule and provided generalized statements that it "believes potential benefits are expected to exceed costs."[48] However, this bare bones analysis "never references potential costs to consumers" as well as other factors that will increase its implementation cost.[49] In contrast to the Administration's lack of economic analysis, the private sector conducted three in-depth studies to understand the economic impact of the rule. The studies use various methodologies and

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[42] USDA News Release No. 0326.10, USDA Announces Proposed Rule to Increase Fairness in the Marketing of Livestock and Poultry (June 18, 2010).
[43] Implementation of Regulations Required Under Title XI of the Food, Conservation and Energy Act of 2008; Conduct in Violation of the Act Proposed Rule, 75 Fed. Reg. 35338 (June 22, 2010).
[44] J. Patrick Boyle, *Addressing USDA Regulations*, POLITICO, Feb. 18, 2011.
[45] *Id.*
[46] Exec. Order No. 12866, 58 Fed. Reg. 51735 (Sept. 30, 1993).
[47] *See* Implementation of Regulations Required Under Title XI of the Food, Conservation and Energy Act of 2008; Conduct in Violation of the Act Proposed Rule, 75 Fed. Reg. 35338 (June 22, 2010).
[48] *Id.* at 35346.
[49] Letter from U.S. Senator Pat Roberts to The Honorable Cass Sunstein, Administrator, Office of Information and Regulatory Affairs (July 26, 2010).

project different final costs; however, the conclusion is the same—the rule is not only significant, it is "economically significant," meaning it will cost more than $100 million annually.[50]

In reaction to these studies and over 60,000 public comments, GIPSA finally agreed to conduct a more "rigorous" cost-benefit analysis.[51] Further, USDA's Chief Economist, Joe Glauber, recently testified at a Congressional hearing that the rule is being reclassified as "economically significant."[52] This designation is extremely important because it heightens the required analysis; the fact that the rule was improperly classified at its inception likely impacted the scrutiny originally applied to it. Accordingly, those in the agricultural sector have requested GIPSA reopen the rule for public comment after the new economic analysis is complete. In addition, Senator Pat Roberts has asked OIRA Administrator Sunstein to ensure that GIPSA complies with E.O. 12866, as well as requirements under the Regulatory Flexibility Act.[53] Unfortunately, Secretary of Agriculture Tom Vilsack indicated that GIPSA does not plan to reopen the comment period once the new cost-benefit analysis is complete.[54] To date, Administrator Sunstein has not replied to Senator Roberts' request.[55]

The pattern of excluding public comments goes back to the earliest days of the proposal. In March 2010, prior to proposing the rule, the USDA initiated a series of five workshops to explore competition and regulation in the agriculture industry.[56] One of the workshops, in May 2010, specifically addressed the poultry industry; another, in August 2010, addressed the livestock industry.[57] Despite the close proximity of these workshops to the rule's proposal, on July 8, 2010, GIPSA Administrator Dudley Butler wrote to members of the livestock industry to inform them that these workshops were "separate and distinct from the GIPSA rulemaking process," the comments made at the workshops "fall outside the comment period," and would not be considered despite the fact they were related to the proposed rule.[58] Yet, in direct contrast to Administrator Butler's letter, GIPSA used anecdotes from the May 2010 poultry workshop in an "Examples of Market Behavior" document released in conjunction with the proposed rule.[59] After inquiries from numerous Senators about the objectivity of GIPSA's rulemaking process, Secretary Vilsack reversed the decision of Administrator Butler and decided that the comments

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[50] American Meat Institute Fact Sheet, What Three Comprehensive Studies Have Said About the Cost of Proposed GIPSA Rule, *available at* http://meatami.com/ht/a/GetDocumentAction/i/64920 (last visited Aug. 28, 2011).
[51] California Poultry Federation, NCC Welcomes Vilsack's Call for Cost-Benefit Analysis of GIPSA Rule, *available at* http://www.cpif.org/index.php?option=com_content&task=view&id=719&Itemid=89 (last visited Aug. 28, 2011).
[52] *Nutrition and Forestry, The State of Livestock in America: Hearing Before the S. Comm. on Agriculture*, 112th Cong. (2011) (question and answer by Joe Glauber, Chief Economist, U.S. Department of Agriculture).
[53] Letter from Senator Pat Roberts to The Honorable Cass Sunstein, Administrator, Office of Information and Regulatory Affairs (July 26, 2011).
[54] Tim Hearden, *Factions trade barbs on GIPSA effort*, CAPITAL PRESS, Mar. 24, 2011.
[55] Email from Senate Agriculture Committee staff to House Oversight Committee staff (Sept. 8, 2011).
[56] USDA News Release No. 0081.10, USDA and Department of Justice Workshops to Explore Competition and Regulatory Issues in the Agriculture Industry to Begin March 12th in Iowa (Feb. 23, 2010).
[57] U.S. Dept. of Justice, Agriculture and Antitrust Enforcement Issues in Our 21st Century Economy Workshop Information, *available at* http://www.justice.gov/atr/public/workshops/ag2010/ (last visited Aug. 28, 2011).
[58] Letter from J. Dudley Bulter, GIPSA Administrator, to Sam Carney, President, National Pork Producers Council (July 8, 2010).
[59] Letter from U.S. Senator Pat Roberts, et al. to The Honorable Tom Vilsack, Secretary, U.S. Dept. of Agriculture (Aug. 26, 2010).

at the workshops would be considered in the rulemaking process.[60] Absent this concession, Administrator Butler's refusal to include such comments runs contrary to the requirement in E.O. 12866 that agencies seek the involvement of those expected to be burdened by a regulation *before* issuing a notice of proposed rulemaking.[61]

During the public comment period GIPSA also took the unusual step of publishing an advocacy document entitled, "Misconceptions and Explanations," related to the proposed rule.[62] Some argue that the document was an attempt to combat against a very contentious House Agriculture Subcommittee hearing in June 2010 where broad, bipartisan concerns were raised about the proposed rule.[63] On its face, the document appears to attempt to persuade Congress, the press, stakeholders, and the public that the rule is needed. It has been argued such advocacy by a federal agency is "contrary to the spirit and intent of the Administrative Procedures Act."[64]

Not only did GIPSA fail to conduct a meaningful cost-benefit analysis of the rule and sought to exclude public participation, GIPSA also violated E.O. 12866 because the rule exceeds the agency's delegated authority and will likely spur litigation. E.O. 12866 mandates that federal agencies promulgate regulations required by law and do so in a way that minimizes the potential for litigation.[65] When Congress debated and passed the Farm Bill, it directed USDA to issue rules that address specific topics. However, GIPSA's proposed rule includes provisions that were explicitly rejected during the Farm Bill debate. For example, the proposed rule includes a provision that requires certain livestock packers and dealers to "maintain written records that provide justification for differential pricing or any deviation from standard price or contract terms offered to certain livestock producers and growers."[66] A similar provision addressing business justification was included in a Senate floor amendment to the Farm Bill that did not pass.[67] The requirement is problematic because it neglects the realities of livestock procurement. Thousands of transactions between packers and producers take place "in the field" and varying prices may be merely the result of better negotiation.[68]

Also, the proposed rule would no longer require a plaintiff to show "competitive injury" to the marketplace, meaning actions that "adversely affec[t] or [are] likely to adversely affect

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[60] U.S Dept. of Justice & U.S. Dept. of Agriculture, Public Workshops Exploring Competition Issues in Agriculture: A Dialogue on Competition Issues Facing Farmers in Today's Agricultural Marketplaces (Aug. 27, 2010) (transcript of Sec. Vilsack's remarks).
[61] Exec. Order No. 12866, 58 Fed. Reg. 51735 (Sept. 30, 1993).
[62] Grain Inspection, Packers and Stockyards Administration, Misconceptions and Explanations, *available at* http://archive.gipsa.usda.gov/psp/rulefacts.pdf (last visited Aug. 28, 2011).
[63] Letter from Rep. Jack Kingston, Ranking Member, Committee on Appropriations Agriculture Subcommittee, to The Honorable Tom Vilsack, Secretary, U.S. Dept. of Agriculture (Aug. 26, 2010).
[64] *Id.*
[65] *See* Exec. Order No. 12866, 58 Fed. Reg. 51735 (Sept. 30, 1993).
[66] Implementation of Regulations Required Under Title XI of the Food, Conservation and Energy Act of 2008; Conduct in Violation of the Act Proposed Rule, 75 Fed. Reg. 35338, 35351 (June 22, 2010).
[67] *See* Tester S. Amdt. No. 3666 to H.R. 2419, Roll Call Vote, 110th Cong. (2007).
[68] American Meat Institute, Comments Filed, Re: Implementation of Regulations Required Under Title XI of the Food, Conservation and Energy Act of 2008; Conduct in Violation of the Act; Proposed Rule; 75 Fed. Reg. 35338 (June 22, 2010).

competition" in a lawsuit brought under the Packers and Stockyards Act of 1921.[69] This language was included in a discussion draft at a Senate committee mark-up of the Farm Bill, but was subsequently deleted.[70] In addition to being contrary to congressional intent, it is also inconsistent with the law as interpreted by eight federal circuit courts.[71] These courts, prior to and after enactment of the Farm Bill, have held that "only those practices that will likely affect competition *adversely* violate the Act."[72] (emphasis added). This provision will undoubtedly increase litigation because it lowers the standard of proof necessary to demonstrate a violation of the Act. Arguably, plaintiffs will no longer need to show actual injury to the marketplace in order to prevail in court. Adding to the controversy, the author of the rule, Administrator Butler, is a former plaintiffs' lawyer who lost a multitude of cases under the current law.[73] Demonstrating clear bias, shortly after Administrator Butler was appointed to his position, he previewed the GIPSA regulations at a speech before the Organization for Competitive Markets. He indicated terms in the rule would be "a plaintiff lawyer's dream" and continued, "*we* can get in front of a jury on [these terms]."[74] (emphasis added). Administrator Butler's clear conflict-of-interest and bias is even more troubling in light of the many ways his agency sought to avoid vetting the rule through the scrutiny of the administrative process.

iii. Impact

The impact of the proposed rule would be extremely costly to the economy and those regulated by the rule. For instance, John Dunham and Associates, a bipartisan firm that conducts economic impact studies on various pieces of legislation, estimated the proposed rule would reduce national GDP by $14 billion, come with a price tag of $1.36 billion in lost revenues to the federal, state, and local governments, and jeopardize 104,000 American jobs in the meat and poultry industry.[75] The study also predicts livestock producers would be especially impacted by the rule, costing up to 21,274 jobs, primarily in rural America.[76] The study also evaluated the impact of the rule on consumers. It concluded that the cost of meat and poultry products would increase by approximately 3.33 percent, meaning consumers would pay an additional $2.7 billion to maintain their current meat consumption.[77]

These findings are bolstered by two additional studies. Informa Economics, Inc., a world leader in domestic and international agricultural market research, estimated the rule would result

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[69] Implementation of Regulations Required Under Title XI of the Food, Conservation and Energy Act of 2008; Conduct in Violation of the Act Proposed Rule, 75 Fed. Reg. 35338, 35351 (June 22, 2010).
[70] American Meat Institute, Comments Filed, Re: Implementation of Regulations Required Under Title XI of the Food, Conservation and Energy Act of 2008; Conduct in Violation of the Act; Proposed Rule; 75 Fed. Reg. 35338 (June 22, 2010).
[71] *Id.*
[72] *Terry v. Tyson Farms, Inc.*, 604 F.3d 272 (6th Cir. 2010).
[73] *See, e.g.*, Bob Barr, *Federal beef boss proposes self-serving changes to rules*, THE HILL, Oct. 26, 2010; Billy Gribbin, *New GIPSA Administrator is the Fox in America's Henhouse*, AMERICANS FOR TAX REFORM, Nov. 18, 2010.
[74] Billy Gribbin, *New GIPSA Administrator is the Fox in America's Henhouse*, AMERICANS FOR TAX REFORM, Nov. 18, 2010.
[75] John Dunham and Associates, Inc., The American Meat Institute Meat Demand Study: The Impact of Proposed Grain Inspection, Packers and Stockyards Administration Proposed Rule 2 (Aug. 2010).
[76] *Id.* at app.1.
[77] *Id.* at 2.

in ongoing and indirect costs to the livestock and poultry industries of more than $1.64 billion.[78] More specifically, it would result in losses near $880 million for the beef industry, more than $401 million for the pork industry, and close to $362 million for the poultry industry.[79] Similarly, FarmEcon LLC, an agricultural consulting firm, estimated the impact of the rule solely on the broiler chicken industry. It concluded the rule would cost more than $1 billion over five years in reduced efficiency, higher costs for feed and housing, and increased administrative expenses.[80] The study also warned the rule would "likely slow the pace of innovation, increase the costs of raising live chickens and result in costly litigation."[81] Equally concerning, the study found the rule could negatively impact U.S. competitiveness abroad. According to the study,

> the Proposed Rul[e] place[s] cost burdens and regulatory restrictions on U.S. broiler companies that do not apply to foreign competitors. To the extent that U.S. chicken company competiveness in global markets is reduced, U.S. chicken net exports would likely decline in a manner similar to the recent decline in EU chicken net exports. Export competitor countries such as Brazil could reap significant benefits from the Proposed Rul[e].[82]

One job creator, Robbie LeValley, and her family, who co-own Homestead Meats, a small direct-beef marketing business, believes the proposed rule "will destroy our small business model, force us to lay off our employees, cripple our ability to market our cattle the way we want to, and limit consumer choice."[83] She believes alternative marketing agreements are "the heart of [their] small business," and the agreements do not warrant further government intervention or being subject to potential litigation.[84]

B. Fish and Wildlife Service Injurious Species Proposed Rule

i. Rule and Purpose

On March 12, 2010, the United States Department of the Interior, Fish and Wildlife Service (FWS) proposed a rule to designate nine snake species as "injurious" under the Lacey Act.[85] The species include four variations of pythons, four variations of anaconda, and the boa constrictor.[86] The Lacey Act, enacted in 1900 and amended in 1981, allows the FWS to list certain species as "injurious" to humans, agriculture, horticulture, forestry, and fish and

[78] Informa Economics, Inc., An Estimate of the Economic Impact of GIPSA's Proposed Rules 53 (Nov. 2010).
[79] *Id.* at 51-53.
[80] FarmEcon LLC, Proposed GIPSA Rules Relating to the Chicken Industry: Economic Impact 27 (Nov. 2010).
[81] *Id*.
[82] *Id.*
[83] *Regulatory Incompetency: How USDA's Proposed GIPSA Rule Hurts America's Small Businesses: Hearing before the H. Comm. on Small Business, Subcomm. on Agriculture, Energy, and Trade*, 112th Cong. (2011) (testimony of Robbie LeValley, Homestead Meats).
[84] *Id.*
[85] Injurious Wildlife Species; Listing the Boa Constrictor, Four Python Species, and Four Anaconda Species as Injurious Reptiles, 75 Fed Reg. 11808 (Mar. 12, 2010).
[86] *Id.*

wildlife.[87] It was intended to prevent a species from developing a presence in the United States. Designating these species as "injurious" will make it illegal to import or transport them across state lines for essentially any purpose other than research.[88]

The FWS proposed the rule to allegedly protect against the spread of destructive invasive species. In the rule preamble, FWS stated "[t]he best available information indicates that this action is necessary to protect the interests of humans, wildlife, and wildlife resources from the purposeful or accidental introduction and subsequent establishment of these large constrictor snake populations into ecosystems of the United States."[89] However, there is a significant body of evidence which suggests that this rule is a solution in search of a problem. While the agency action is intended to address a problem that exists in Florida, the rule has significant implications for small businesses across the United States.[90]

ii. Broken Process

In proposing this rule, it appears the FWS violated the administrative process in a number of ways. First, FWS has completely ignored the counsel of the U.S. Small Business Administration, which has warned that the agency failed to analyze the economic impact the rule will have on small businesses and their workers across the country.[91] Second, the scientific basis underpinning the action has been called into question. Finally, there are significant questions about whether the agency should be using the Lacey Act for this purpose.

The Office of Advocacy (Advocacy), within the Small Business Administration, is the federal voice for small business interests during the rulemaking process. Advocacy informed the FWS that its Initial Regulatory Flexibility Act Analysis (IRFA) was sorely lacking. In a letter to Department of Interior Secretary Ken Salazar, Advocacy stated that it "has concerns that the IRFA does not adequately capture the economic impacts of the proposed rule on small businesses. Advocacy also believes that the IRFA does not adequately discuss significant alternatives to the proposed rule, as required by the [Regulatory Flexibility Act]."[92]

In its letter, Advocacy asserts that the claim by FWS that there was no time to conduct an economic analysis is baseless, and recommends that the agency supply a new IRFA.[93] Advocacy further criticized the FWS for not properly identifying the small businesses that would be affected by the rule. It noted the agency only acknowledged importers and companies selling snakes over state lines, but ignored other participants in the market such as those who support

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[87] Liana Sun Wyler & Pervaze A. Sheikh, Congressional Research Service, International Illegal Trade in Wildlife: Threats and U.S. Policy (2010), *available at* http://www.crs.gov/pages/Reports.aspx?PRODCODE=RL34395&Source=search.

[88] Injurious Wildlife Species; Listing the Boa Constrictor, Four Python Species, and Four Anaconda Species as Injurious Reptiles, 75 Fed Reg. 11808 (Mar. 12, 2010).

[89] *Id.*

[90] Leslie Kaufman, *Snake Owners See Furry Bias in Invasive Species Proposal*, N.Y. TIMES, Jan. 8, 2011, a*vailable at* http://www.nytimes.com/2011/01/09/science/earth/09snakes.html.

[91] Letter from Susan M. Walthall, Acting Chief Counsel for Advocacy, & Jamie Belcore Saloom, Assistant Chief Counsel for Advocacy, Small Bus. Admin. Office of Advocacy, to the Honorable Ken Salazar, U.S. Department of the Interior (May 10, 2010) (on file with author).

[92] *Id.*

[93] *Id.*

feeding, keeping, and caring for these animals.[94] For instance, FWS assumed a sales reduction of 20 to 80 percent for sellers of live snakes, but did not account for a sales reduction of other market participants. Further, in regard to their limited estimate, FWS "[did] not provide factual support for [their] assumption or any further analysis."[95] Finally, Advocacy notes that FWS did not consider less harmful alternatives as required by the RFA, such as regional solutions, public-private partnerships to prevent invasive imports, or educating the public about the dangers of release.[96]

In addition to its failure to conduct an adequate analysis of the small business impact of the rule, the scientific basis for the rule is also questionable. FWS relied on a study performed by the United States Geological Survey (USGS),[97] which detected the presence of some snakes as far north as North Carolina and Northern California.[98] However, these findings are directly contradicted by other peer-reviewed literature. For instance, two studies on Burmese pythons, which the USGS report claims have the largest potential range in the United States, demonstrate that when exposed to cold, the snakes show a high mortality rate that casts doubt on their ability to survive outside of the Everglades in South Florida.[99] Further, a study conducted by biologists at the City University of New York found that these snakes will only survive in South Florida and the southernmost tip of Texas.[100] Thus, there is still a significant debate about whether there is a national problem to be solved.

Another concern about the proposed rule is the misuse of the Lacey Act, specifically with respect to its application to species kept as pets that are already in the country in large numbers.[101] For instance, according to a source involved in the industry, there are an estimated 600,000 boa constrictors already in the United States as pets, if not more.[102] Moreover, with respect to Burmese pythons, a 2007 FWS memo explains that by "[i]nvoking the injurious species provision of the Lacey Act, [FWS] would merely create the illusion of action with little possibility of any real impact on the problem at hand."[103] The memo also indicates that using

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[94] *Id.*
[95] *Id.*
[96] *Id.*
[97] Injurious Wildlife Species; Listing the Boa Constrictor, Four Python Species, and Four Anaconda Species as Injurious Reptiles, 75 Fed Reg. 11808 (Mar. 12, 2010).
[98] R.N. Reed & G.H. Rodda, Giant constrictors: biological and management profiles and an establishment risk assessment for nine large species of pythons, anacondas, and the boa constrictor: U.S. Geological Survey Open-File Report 2009–1202 (2009), *available at* http://pubs.usgs.gov/of/2009/1202/pdf/OF09-1202.pdf.
[99] Michael L. Avery et al., Cold weather and the potential range of invasive Burmese pythons (2010); Frank J. Mazzotti et al., Cold-induced mortality of invasive Burmese pythons in south Florida (2010).
[100] R.A. Pyron, F.T. Burbrink, & T.J. Guiher, Claims of Potential Expansion throughout the U.S. by Invasive Python Species Are Contradicted by Ecological Niche Models (2008), *available at* http://www.plosone.org/article/info%3Adoi%2F10.1371%2Fjournal.pone.0002931.
[101] Mamie Parker and Benito Perez, Information Memorandum for the Director: Burmese Pythons and Injurious Wildlife Evaluations, Sept. 6, 2007.
[102] Email from David G. Barker, Owner, Vida Preciosa International (Aug. 30, 2011, 7:00pm EST) (on file with author).
[103] Memorandum from Mamie Parker, Assistant Director-Fisheries and Habitat Conservation, & Benito Perez, Assistant Director-Law Enforcement, to Director, U.S. Fish and Wildlife Service (Sept. 6, 2007) (on file with author).

scarce law enforcement resources on the interstate prohibition of these pets would detract from defending against other more traditional and urgent Lacey Act species.[104]

Finally, to the extent a problem exists, states are already taking action. Accordingly, there is no regulatory gap that the Federal government needs to step in and fill. For example, tropical Hawaii has banned these snakes, and offenders of the statute face a $200,000 fine and three years in prison.[105] In Florida, five of the nine snakes proposed as "injurious" by the FWS, including the Burmese python, are already banned from possession, breeding, or sale for personal use.[106] In recent years, the state of Texas has passed laws requiring buyers and commercial sellers of certain snakes, including the Burmese python, to first obtain a permit. Those caught releasing these snakes receive a heavy fine.[107] As these examples demonstrate, states have the tools to take action, which further calls into question the merit of the regulatory action.

iii. Impact

According to a study commissioned by the United States Association of Reptile Keepers (USARK), 99 percent of those who will be affected by this rule are small businesses.[108] The study estimates that in the first year, this rule will reduce industry revenues between $76 and $104 million.[109] Over the first ten years, the combined loss could be between $505 million and $1.2 billion.[110] According to Andrew Wyatt, the head of USARK, the U.S. is a global leader in the reptile industry and is responsible for an estimated 82 percent of the world's trade in these animals.[111] He goes on to say the business "is a cottage industry that is booming in the United States and we need to keep it."[112]

The effect of this regulatory action on small businesses could be devastating. For instance, Jeremy Stone Reptiles in Lindon, Utah, began to feel the effects of the injurious ruling as soon as it was proposed. Since 2008, Jeremy and his wife have reduced their staff from seven employees to three.[113] He says that if the rule goes through "my business would be over. 18 years of hard work, education, and a successful growing business would be lost. My dream of supporting my family would be over, and I would have to start over at age 37."[114] Similarly,

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[104] *Id.*
[105] Mari-Ela David, *Large Snake Discovered on Hawaii Island*, HAWAII NEWS NOW, Dec. 22, 2009, *available at* http://www.hawaiinewsnow.com/story/11718466/large-snake-discovered-on-hawaii-island?redirected=true.
[106] FLA. STAT. § 379.372 (2011).
[107] Shannon Tompkins, *Texas Tries to Control Invasion of Exotic Snakes*, HOUS. CHRON., Feb. 28, 2008, *available at* http://www.chron.com/life/gardening/article/Texas-tries-to-control-invasion-of-exotic-snakes-1641665.php.
[108] Ariel H. Collis & Robert N. Fenili, Georgetown Economic Services, LLC, The Modern U.S. Reptile Industry (2011).
[109] *Id.*
[110] *Id.*
[111] Telephone Interview with Andrew Wyatt, Chief Executive Officer, U.S. Ass'n of Reptile Keepers (Aug. 25, 2011).
[112] *Id.*
[113] Email from Jeremy Stone, Owner, Jeremy Stone Reptiles, Inc. (Aug. 26, 2011, 12:49pm EST) (on file with author).
[114] Email from Jeremy Stone, Owner, Jeremy Stone Reptiles, Inc. (Aug. 31, 2011, 11:45am EST) (on file with author).

David G. Barker and his wife Tracy, who own Vida Preciosa International, a business specializing in the research and captive-propagation of pythons and boas in Boerne, Texas, will be economically devastated by the proposed rule. According to Barker:

> If the proposed action is implemented, it will directly and negatively affect our incorporated small business and our family income. It will destroy some 20 years of work and it essentially confiscates the value [of] our … investments in breeding stock, and equipment, and removes all value to our colony of breeding animals. It will stop all of our interstate and international business, which a review of our Texas State sales tax will show is 95% of our business. It will immediately reduce our family income by 35% or more at a time when work and income come hard. Additionally, our business is interconnected with many other local businesses that will be negatively affected by the restrictions placed on our business. There are thousands of other families with small snake-breeding businesses in similar situations as ours.[115]

In sum, it appears as though this regulatory action taken by the FWS, which did not undergo a proper economic analysis, is contrary to the purpose of the Lacey Act, is based on questionable science, and has the ability to devastate a small but thriving sector of the economy.

C. Securities and Exchange Commission Proxy Access Final Rule

i. Rule and Purpose

In accord with the Dodd-Frank Act, the Securities and Exchange Commission (SEC) issued the Exchange Act Rule 14a-11, also known as the "proxy access rule," to alter current proxy rules that govern how shareholders elect the board of directors at public companies.[116] Under the new rules, any shareholder or group of shareholders owning at least three percent of a public company's voting stock for at least three years could include its own slate of nominees in the company proxy materials. By promulgating the proposed rule, the SEC sought to improve the minority shareholders' ability to gain or expand representation on the board of directors.[117]

ii. Broken Process

The rule is an example of a broken regulatory process in that the SEC failed to properly consider the expected costs and benefits of the rule. Indeed, the Business Roundtable and the U.S. Chamber of Commerce challenged the validity of these rules in the District of Columbia Circuit Court of Appeals, arguing that the SEC violated the APA because it ignored hidden costs and failed to consider the rule's effect on efficiency, competition and capital formation as required by both the Securities Exchange Act of 1934 and the Investment Company Act of 1940.[118] The SEC argued that the proposed proxy rule shows "potential benefits of improved

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[115] Email from David G. Barker, Owner, Vida Preciosa International (Aug. 28, 2011, 11:25pm EST) (on file with author).
[116] Facilitating Shareholder Director Nominations: Final Rule, 75 Fed. Reg. 56668 (Sept.16, 2010).
[117] *See id.*
[118] *Business Roundtable and Chamber of Commerce of the United States v. SEC*, No. 10-1305 (D.C. Cir. July 22, 2011).

board and company performance and shareholder value" which "justify [its] potential costs."[119] The D.C. Circuit resoundingly rejected the arguments of the SEC and vacated the rule.[120] In its decision, the court generally declared that "the Commission inconsistently and opportunistically framed the costs and benefits of the rule; failed adequately to quantify the certain costs or to explain why those costs could not be quantified; neglected to support its predictive judgments; contradicted itself; and failed to respond to substantial problems raised by commenters."[121] The court determined "by ducking serious evaluation of [these] costs the SEC acted "arbitrarily."[122]

Specifically, the SEC "hastily relied on two 'unpersuasive studies' which did not take into account any economic consequences."[123] It made feeble attempts to estimate the costs companies might incur in proxy access fights and failed to evaluate whether the rule would "impose greater costs upon investment companies by disrupting the structure of their governance."[124] The SEC also failed to take into account the use of the rule by shareholders representing special interests, such as union and government pension funds. In light of the SEC's statutory "obligation to consider the effect of a new rule upon efficiency, competition, and capital formation," the court held that the promulgation of the proxy access rule with these defects and others was arbitrary, capricious, and not in accordance with law.[125]

This case has exposed a dangerously flawed administrative process used by the SEC that will impact all companies subject to regulations that would have otherwise failed a proper cost-benefit analysis. While the court intervened in this instance, the proxy access rule is evidence of a larger problem at the SEC. As an independent agency, SEC regulations are not subject to scrutiny by OIRA and the analytical requirements of E.O. 12866.[126] In addition, SEC Chairman Mary Schapiro revealed that bureaucrats responsible for drafting regulations are also responsible for preparing the related cost-benefit analyses.[127] In other words, there is no one within the bureaucracy checking the work of those drafting regulations to identify errors or to offer objective analysis. This creates a set of incentives whereby the agency does not give serious consideration to the cost imposed by its regulations on job creators.

iii. Impact

The SEC's failure to properly conduct cost-benefit analyses threatens the efficiency of publicly registered companies. Such inefficiencies and unjustified burdens reduce the ability of registered companies to compete, particularly when those outside of the SEC's jurisdiction can

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[119] *Id*.
[120] *Id*. at 3.
[121] *Id*. at 7 (emphasis added).
[122] *Id*. at 15.
[123] *See id*. at 11-12.
[124] *See id*. at 11; *see also id.* at 18.
[125] *Id*. at 6 (internal citations omitted).
[126] *See* Exec. Order No. 12866, 58 Fed. Reg. 51735 (Sept. 30, 1993).
[127] Letter from Mary Schapiro, Chairman, Sec. and Exch. Comm'n, to Darrell E. Issa, Chairman, H. Comm. on Oversight and Gov't Reform, at 11 (Apr. 5, 2011); Letter from Mary Schapiro, Chairman, Sec. and Exch. Comm'n, to Darrell E. Issa, Chairman, H. Comm. on Oversight and Gov't Reform, at 1-2 (May 25, 2011) ("Commission staff members from the division or office responsible for the subject matter of a rule typically are responsible for drafting the initial cost-benefit analysis.").

avoid the additional cost and burden.[128] The resulting competitive disadvantage reduces registered entities' ability to raise capital, grow, and hire employees.[129] As such failures continue and result in multiple regulations that create excessive burdens and costs, the aggregate impact will likely cause substantial harm to our financial markets as well, draining liquidity as businesses choose lighter regulation of markets overseen by more reasonable regulators overseas.[130] The SEC's poor performance evaluating the true cost of the proxy access rule highlights a fundamental failure in its duty to perform cost-benefit analysis. Hopefully the SEC will heed the court's warning.

III. DECADES OF REGULATORY PRECEDENT REVERSED

Pursuant to E.O. 12866, executive branch agencies should only issue regulations that are, among other things, necessary to interpret law or address a compelling public need. The regulation below is an example of an independent agency, conveniently not subject to E.O. 12866 or OIRA's scrutiny, issuing a rule that defies long-standing precedent, statutory intent, and agency practice with no compelling public need. Rather, there is the unmistakable imprint of pro-union bias.

A. National Mediation Board Minority Voting Final Rule

i. Rule and Purpose

For seventy-five years, union elections in the American railroad and airline industries operated under a "majority voting rule" in which a majority of all eligible employees in the entire craft or class was required to agree on a union representative.[131] The National Mediation Board (NMB) – the agency charged by Congress with settling labor disputes arising under Railway Labor Act (RLA)[132] – specially tailored this rule to the unique national character of the railroad and airline industries.[133] It was purposefully unlike the certification process for union elections in localized industries, where a majority of employees voting in the election could certify a local union,[134] and thirty percent of employees could begin the decertification process.[135] In May 2010, the NMB promulgated a new rule that abandoned its decades-old precedent in favor of union certification by only a small number of employees.[136] Under this "minority voting rule," the Board can "certify as collective bargaining representative any organization which receives a majority of valid ballots cast in an election."[137]

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[128] *See* Financial Services Authority, The Economic Rationale for Financial Regulation (Apr. 1999).
[129] *Id.*
[130] *Id.*
[131] 45 U.S.C. § 152, Fourth.
[132] 45 U.S.C. § 151 *et seq.* The NMB was established by Congress in 1934. *See* Pub. L. No. 73-442, 48 Stat. 1185 (1934). Congress added the airline industry to the NMB's jurisdiction in 1936. *See* Pub. L. No. 74-487, 49 Stat. 1189 (1936).
[133] *See* National Mediation Board, Administration of the Railway Labor Act by the National Mediation Board 1934-1970, at 70 (1970).
[134] 29 U.S.C. § 159(a).
[135] *See id.* § 159(e)(1).
[136] *See* Representation Election Procedure, 75 Fed. Reg. 26062, 26062 (May 11, 2010).
[137] *Id.*

ii. Broken Process

The process by which NMB adopted the minority voting rule was fundamentally flawed. The NMB "has a long-standing policy of amending its rules only when required by statute or when essential to the administration of the [RLA]."[138] When changing its policy, the NMB committed itself to doing so only after "a full, evidentiary hearing with witnesses subject to cross-examination,"[139] and it required the level of proof for such a change to be "quite high."[140] As recently as 2008, the NMB reaffirmed that it "would not make such a sweeping [policy] change without first engaging in a complete and open administrative process to consider the matter."[141] Yet, in promulgating the minority voting rule, the NMB did just the opposite. It held a superficial public meeting in which each commenter was limited to only twenty minutes, without any right to cross-examination or a full development of the issues.[142] The NMB did not articulate any pressing need or a statutory authorization for the change – aside from a vague assertion that the majority rule "was adopted in an earlier era, under circumstances that are different from those prevailing in the rail and air industries today."[143] Without a more detailed explanation, the NMB failed to provide a reasoned analysis for the rule change, as required by law.[144]

In particular, the internal deliberations of the Board showcase the extent to which the rulemaking was flawed. The two NMB board members who authored the minority voting rule – Harry Hoglander and Linda Puchala – were both appointed by President Obama.[145] In a breach of the NMB's longstanding cooperative approach to rulemaking, Board Members Hoglander and Puchala excluded the third board member, Chairman Elizabeth Dougherty – the lone Republican appointee – from the decision-making process and unreasonably limited her ability to dissent from the proposed rule.[146] Chairman Dougherty was made aware of the proposed rule only at the eleventh hour, after Board Members Hoglander and Puchala had drafted the rule and were preparing to formally issue it.[147] She was first told that she could not publicly dissent from the proposed rule, and after she protested, she was allowed to author a dissent, albeit with severe

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[138] *Chamber of Commerce*, 14 N.M.B. 347, 356 (1987).
[139] *Chamber of Commerce*, 13 N.M.B. 90, 94 (1986).
[140] *Chamber of Commerce*, 14 N.M.B. at 363.
[141] *Delta Air Lines, Inc.*, 35 N.M.B. 129, 132 (2008).
[142] *See* NMB Open Meeting Speakers List, http://www.nmb.gov/representation/proposed-rulemaking/speakers-list_12-07-09.html.
[143] Representation Election Procedure, 75 Fed. Reg. 26062, 26062 (May 11, 2010).
[144] *Panhandle Eastern Pipe Line Co. v. Fed. Energy Regulatory Comm'n*, 196 F.3d 1273, 1275 (D.C. Cir. 1999) ("The public interest may change either with or without a change in circumstances . . . but an agency changing its course must supply a reasoned analysis . . . . [I]f it wishes to depart from its prior policies, it must explain the reasons for its departure.").
[145] President Obama nominated Linda Puchala on March 13, 2009. *See* Press Release, President Obama Announces More Key Administration Posts (Mar. 13, 2009), *available at* http://www.whitehouse.gov/the_press_office/President-Obama-Announces-More-Key-Administration-Posts-3-13-09/. President Obama re-nominated Harry Hoglander on June 9, 2009. *See* Press Release, President Obama Announces More Key Administration Posts (June 9, 2009), *available at* http://www.whitehouse.gov/the_press_office/President-Obama-Announces-More-Key-Administration-Posts-6-9-09/.
[146] *See* Letter from Elizabeth Dougherty to United States Senators Mitch McConnell, Johnny Isakson, Pat Roberts, Tom Coburn, Judd Gregg, Michael Enzi, Orin Hatch, Lamar Alexander, and Richard Burr (Nov. 2, 2009).
[147] *Id.*

content and time restrictions.[148] In Chairman Dougherty's view, the rulemaking process exhibited a "complete absence of any principled process or consideration of [her] role as an equal Member of the Board."[149] Chairman Dougherty has publicly documented her disagreement with the rule and the "unprecedented" procedures the Board used to finalize it.[150] The rule currently faces a challenge in federal court as an arbitrary and capricious exercise of agency authority and as being contrary to legislative intent.[151] Oral argument is scheduled for September 19, 2011.[152]

The highly irregular process for developing this rule strongly suggests that the NMB majority had already decided to change the rule to favor organized labor and that the rulemaking process was a mere formality to be dispensed with as quickly as possible. The timing of the rule change is particularly concerning. The majority voting rule had been in place for seventy-five years, and as recently as 2008, the Board denied a request to change it.[153] After the 2008 presidential election changed the composition of the NMB, and as the Board faced several large representational elections, the Board received a request from the Transportation Trades Department of the AFL-CIO to change the election procedures.[154] The two Democratic-appointed members of the Board then quickly initiated a rulemaking with only limited public comment and without any consultation from the sole Republican-appointed Board member. These unusual circumstances leave "unattractive inferences involving a shift in political power and the imminence of several large representation elections."[155] These inferences are particularly unsettling given the corresponding actions of two labor unions – the International Association of Flight Machinists (IAM) and the Association of Flight Attendants (AFA) – in withdrawing their representation applications simultaneous to the publication of the proposed rule.[156] The AFA announced its withdrawal on the same day that the NMB issued the proposed minority voting rule,[157] even though the prospective application of the rule was not publicly known prior to its publication. If the AFA had not withdrawn its application, it would have been subjected to the majority voting rule. The close proximity of the withdrawals to the publication of the proposed rule suggests that someone within the Board may have improperly communicated with the unions about the rule's prospective application.

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[148] *Id.*
[149] *Id.*
[150] *See* Representation Election Procedure, 75 Fed. Reg. 26062, 26083-88 (May 11, 2010) (Dougherty, dissenting); Letter from Elizabeth Dougherty to United States Senators Mitch McConnell, Johnny Isakson, Pat Roberts, Tom Coburn, Judd Gregg, Michael Enzi, Orin Hatch, Lamar Alexander, and Richard Burr (Nov. 2, 2009).
[151] *See Air Transp. Assoc. of America v. Nat'l Mediation Bd.*, No. 10-5253 (D.C. Cir. filed May 11, 2011).
[152] United States Court of Appeals for the District of Columbia Circuit, Public Calendar from 09/12/2011 through 10/23/2011, http://www.cadc.uscourts.gov/internet/sixtyday.nsf/fullcalendar?OpenView&count=1000.
[153] *See Delta Air Lines*, 35 N.M.B. at 132.
[154] *See* Letter from Edward Wytkind, Transportation Trades Department, to Elizabeth Dougherty, Harry Hoglander, and Linder Puchala, National Mediation Board (Sept. 2, 2009).
[155] Representation Election Procedure, 75 Fed. Reg. 26062, 26085 (May 11, 2010) (Dougherty, dissent).
[156] *See id.* at 26083 n. 2.
[157] Press Release, AFA-CWA Applauds National Mediation Board for Proposed Voting Procedure Change (Nov. 3, 2009), *available at* http://www.afacwa.org/default.asp?id=1229.

iii. Impact

The new minority voting rule threatens to significantly harm our economy and, in particular, our domestic airline industry. Certification of a union representative without majority support may cause difficulty in ratifying collective bargaining agreements and an inability of the airlines to prevent unauthorized work stoppages.[158] Such labor uncertainty is dangerous to our economic recovery, as the commercial airlines contribute $731 billion to the gross domestic product and affect almost 11 million jobs.[159] Moreover, with two million people and 50,000 tons of cargo flying daily,[160] the effects of labor strife will assuredly be felt by every American. The rule likewise adversely affects airline employees. For example, Mathew Palmer, a Delta flight attendant, believes that his job will be directly affected by the rule change insofar as his career "depends on whether [flight attendants] are unionized or not."[161] He stated that his current pay and benefits at Delta are better to those in any proposed union contract for Delta flight attendants, and that non-unionization allows Delta to be flexible with its employees.[162] Palmer labeled the minority voting rule as "silly" because, in his words, a union "is only as good as supported" by the employees.[163] In the coming months, Delta flight attendants will continue to face uncertainty as the NMB investigates allegations of interference during the most recent union election.[164] Delta, as a result, cannot move forward in "fully aligning the complete package of pay, benefits, work rules, and seniority for all of [its] flight attendants."[165]

In adopting this rule, the NMB ignored seventy-five years of representation elections that reflected the unique national character and importance of the railway and airline industries. The new rule, despite affecting billion of dollars and millions of jobs, was not deemed "significant" by the NMB.[166] It was, however, a departure from the law, a deviation from the Board's own deliberative practices, and striking evidence of the Board's favoritism to organized labor.

IV. SUE AND SETTLE AGREEMENT

"Sue and settle," a term coined by Minnesota Democratic Rep. Colin Peterson, refers to questionable decisions by regulatory agencies, most frequently the EPA, to settle lawsuits brought against them by special interest environmental groups.[167] In doing so, agencies bypass the proper rulemaking process and avoid basic principles of transparency and accountability. The removal of the opt-out provision in the lead paint rule is a blatant example of the EPA entering into one of these agreements to the detriment of job creators.

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[158] *See* Representation Election Procedure, 75 Fed. Reg. 26062, 26086 (May 11, 2010) (Dougherty, dissent).
[159] *See* Air Transport Association, Economic Impact, *available at* http://www.airlines.org/Economics/AviationEconomy/Pages/EconomicImpact.aspx.
[160] *See* Air Transport Association, When America Flies, It Works: 2010 Economic Report 12, *available at* http://www.airlines.org/Economics/ReviewOutlook/Documents/2010AnnualReport.pdf.
[161] Telephone Interview with Matthew Palmer, Delta Air Lines Flight Attendant (Aug. 15, 2011).
[162] *Id.*
[163] *Id.*
[164] Email from Joanne Smith, Senior Vice President, Delta Air Lines, to All Delta Flight Attendants (June 1, 2011).
[165] *Id.*
[166] *See* Representation Election Procedure, 75 Fed. Reg. 26062 (May 11, 2010).
[167] *See* Press Release, Committee on Oversight and Government Reform, Issa: EPA Using "Sue and Settle" to Regulate Job Creators (Apr. 19, 2011).

A. Environmental Protection Agency Lead Paint Opt-Out Provision Final Rule

i. Rule and Purpose

In 2008, the Environmental Protection Agency (EPA) issued the Lead Renovation, Repair and Painting Rule pursuant to the Toxic Substances Control Act to address lead-based paint hazards in housing and child-occupied facilities built before 1978.[168] The rule requires that renovations to a home built before 1978 follow certain work practices supervised by an EPA-certified renovator and performed by an EPA-certified firm.[169] After a thorough review of the science and consultation with small businesses, EPA determined that an opt-out provision in the rule, exercised at the election of a homeowner, could still protect from the dangers of lead paint.[170] The opt-out provision allowed a job creator to forgo the training and work practice requirements if they obtained a certificate from the homeowner stating that no children under age six or a pregnant woman resided in the home.[171] However, this balanced approach was challenged by special interest environmental groups. Instead of defending the rule in court, EPA opted to enter into a settlement agreement. This settlement agreement, negotiated solely between EPA and special interests, required EPA to propose and finalize a new rule that removed the opt-out provision.[172] On October 28, 2009, EPA proposed the rule, and it was finalized on May 6, 2010.

Unfortunately, in addition to dramatically increasing costs for job creators and homeowners alike, it appears that removing the opt-out provision may be increasing the risk of exposure to lead paint. Since EPA finalized the rule, many homeowners are choosing to perform their own renovations or hiring "fly-by-night" contractors in order to avoid the higher costs charged by EPA certified contractors.[173]

ii. Broken Process

EPA's pledge to remove the opt-out provision demonstrates a broken regulatory process because the decision was not the result of careful study, but rather an exclusive negotiation between EPA and environmentalists. Because the rule was negotiated only with these interest groups, the interests of other stakeholders, like small business owners, were not adequately represented. Rules issued in this manner are often unfair and detrimental to job creators in that they force specific agency action often desired by environmental groups, while denying other stakeholders a seat at the table. For instance, it appears that EPA violated the Regulatory

[168] Lead; Renovation, Repair, and Painting Program, 73 Fed. Reg. 21692 (Apr. 22, 2008).
[169] *Id.*
[170] Letter from Susan Walthall, Acting Chief Counsel, & Kevin Bromberg, Chief Counsel for Envtl Policy, Small Bus. Admin. Office of Advocacy, to the Honorable Lisa Jackson, Administrator, Envtl Prot. Agency (Nov. 27, 2009).
[171] Lead; Renovation, Repair, and Painting Program, 73 Fed. Reg. 21692 (Apr. 22, 2008).
[172] Motion to Sever and Hold in Abeyance Nos. 08-1235 and 08-1258, *Nat'l Assoc. of Homebuilders v. Envtl Prot. Agency*, No. 08-1193 (D.C. Cir. Aug. 26, 2009) (settlement agreement between the EPA and public interest groups).
[173] National Association of the Remodeling Industry, Summary of Survey about the EPA's Lead Renovation, Repair, Painting (LRRP) Rule (July 2011).

Flexibility Act (RFA) when it agreed to the settlement.[174] After the settlement was reached, the Small Business Administration Office of Advocacy (Advocacy), which was created by Congress to advocate the views of small businesses before Federal agencies and Congress,[175] wrote a scathing letter to the EPA criticizing them for neglecting to adequately consider the impact of the rule on small business.[176] Advocacy pointed out that for rules that are expected to have a "significant economic impact on a substantial number of small entities," EPA is required by the RFA to conduct a Small Business Advocacy Review Panel to assess the impact of the proposed rule on small entities, and to consider less burdensome alternatives.[177]

In its letter, Advocacy asserted that EPA neglected to adhere to the requirements of the RFA by "fail[ing] to perform needed outreach and fail[ing] to examine seriously several regulatory alternatives that would minimize the small business burdens while achieving the same regulatory goals."[178] Specifically, Advocacy stated that because the EPA signed the settlement agreement, which mandated that the proposed rule be issued by a certain time, Advocacy "did not have a timely opportunity to discuss the Small Business Advocacy Review Panel requirement with the EPA before the proposal was issued."[179]

In addition to EPA's violation of the RFA, Advocacy also correctly pointed out that the EPA did not rely on any new science when it decided to remove the opt-out provision. Instead, EPA merely re-evaluated the original science.[180] Advocacy claimed this re-interpretation was "unconvincingly thin," to demonstrate the claimed benefits to society.[181] EPA's claimed benefits directly conflict with conclusions drawn by the agency in 2008. At that time, EPA explained that it "does not believe it is an effective use of society's resources to impose this final rule requirements [sic] on all renovations …."[182] Therefore, absent the settlement agreement, it is hard to reconcile EPA's position in 2008 that an opt-out provision could preserve the net benefits of the rule, with EPA's removal of the opt-out provision just two years later.[183]

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[174] Letter from Susan Walthall, Acting Chief Counsel, & Kevin Bromberg, Chief Counsel for Envtl Policy, Small Bus. Admin. Office of Advocacy, to the Honorable Lisa Jackson, Administrator, Envtl Prot. Agency (Nov. 27, 2009).
[175] Pub. L. No. 94-305, 90 Stat. 663 (1976).
[176] Letter from Susan Walthall, Acting Chief Counsel, & Kevin Bromberg, Chief Counsel for Envtl Policy, Small Bus. Admin. Office of Advocacy, to the Honorable Lisa Jackson, Administrator, Envtl Prot. Agency (Nov. 27, 2009).
[177] *See* 5 U.S.C. § 609(a), (b).
[178] Letter from Susan Walthall, Acting Chief Counsel, & Kevin Bromberg, Chief Counsel for Envtl Policy, Small Bus. Admin. Office of Advocacy, to the Honorable Lisa Jackson, Administrator, Envtl Prot. Agency (Nov. 27, 2009).
[179] *Id.*
[180] *Id.*
[181] *Id.*
[182] Lead; Renovation, Repair, and Painting Program, 73 Fed. Reg. 21692 (Apr. 22, 2008).
[183] Letter from Susan Walthall, Acting Chief Counsel, & Kevin Bromberg, Chief Counsel for Envtl Policy, Small Bus. Admin. Office of Advocacy, to the Honorable Lisa Jackson, Administrator, Envtl Prot. Agency (Nov. 27, 2009).

iii. Impact

There is evidence that this rule unnecessarily raises costs, drives homeowners to use inexperienced and untrained contractors, and encourages "do-it-yourself" work which could actually endanger children's health.[184] A recent survey about the rule conducted by the National Association of the Remodeling Industry shows that 77 percent of homeowners are avoiding the added cost of the rule by doing remodeling work on their own, or hiring a non-certified contractor to perform the work.[185] Accordingly, job creators in the construction industry are feeling the impact. For example, Ryann Day, who owns a home-remodeling and construction company in Seattle, Washington, believes "the EPA's regulation on lead paint is the most restrictive regulation."[186] Ryann has lost 10 to 20 job opportunities to his competitors who offer lower bids because they do not comply with the rule. As a result, he chose not to hire an additional employee and lost approximately $15,000 to $20,000 in business. Homeowners who do accept his bid are forced to pay an additional 20 percent surcharge if their homes were built before 1978. He said "we need to be able to operate our business in a common sense dictated market where customers and contractors make decisions based on knowledge and ability, not on government-imposed regulations."[187] This sentiment was echoed by Tim Englert, the President of Tim Englert Construction, who said "since the opt-out provision disappeared, it's a hardship on the whole industry that is unwarranted."[188] The rules are "setting contractors up for failure," and there is "no incentive to expand my business with all the unknowns."[189]

Due to EPA's decision to enter into a "sue and settle" agreement with special interest environmental groups and remove the balanced "opt-out" provision in the 2008 rule, job creators are forced to comply with a job killing regulation that lacked their input and violated the RFA.

V. MISUSE OF GUIDANCE DOCUMENTS

Guidance documents, while not legally binding, are supposed to be issued only to clarify regulations already on the books.[190] However, under this Administration, they are increasingly used to effect policy changes. While not technically enforceable, they often are as effective as regulations in changing behavior due to the weight agencies and the courts give them.[191] Accordingly, job creators feel pressure to abide by them because they fear backlash from agencies. Agencies who wish to avoid meaningful scrutiny can avoid regulatory analyses by issuing policy changes through guidance documents. OIRA claims to review "significant" guidance documents,[192] but because they are not technically regulations, it is unclear what

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[184] *Id.*
[185] National Association of the Remodeling Industry, Summary of Survey about the EPA's Lead Renovation, Repair, Painting (LRRP) Rule (July 2011).
[186] Submission of Ryann Day to AmericanJobCreators.com and his interview with Committee staff (May 20, 2011).
[187] *Id.*
[188] Submission of Tim Englert to AmericanJobCreators.com and his interview with Committee staff (June 7, 2011).
[189] *Id.*
[190] *See* Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 399-400 (2007).
[191] *Id.* at 400.
[192] Memorandum from Peter R. Orszag, Director, Office of Management and Budget, to the Heads and Acting Heads of Executive Departments and Agencies (Mar. 4, 2009).

criteria OIRA is using. Below is an example of EPA's attempt to negatively impact the mining industry through a guidance document.

A. Clean Water Act Section 404 Permitting Guidance

i. Rule and its purpose

A crucial step in developing or expanding a mining site is the permitting process. Clean Water Act (CWA) Section 404 permits are just one of dozens of permits required to begin operations, but operators are literally going bankrupt because of the excessive delays in receiving this particular permit.[193] These delays are due to an "enhanced review process" initiated in violation of the Administrative Procedure Act (APA).

Section 404 of the CWA regulates activities, including mining operations, which "discharge dredge and fill material" into "waters of the United States." Through the CWA, Congress gave the Army Corps of Engineers (Corps) the authority to issue permits (referred to as 404 permits) for such activities, but EPA and other agencies may review and comment on permit applications. The Corps issues the 404 permits using guidelines established by the EPA. EPA also has a unique authority under section 404(c) to prohibit, restrict, or withdraw the "specification" of a disposal site, and thereby can influence the Corps' permitting decisions.

EPA has taken a number of actions in the past few years to expand and exert its influence over 404 permits. These actions began in June 2009 when EPA and the Corps issued a joint "enhanced coordination memorandum" ("EC memo") to "facilitate" review of 108 pending permits for coal mines.[194] Pursuant to the EC memo, EPA concluded that 79 of the 108 pending permits "raised environmental concerns" and thus would be subject to further enhanced review.[195]

On April 1, 2010, EPA released a new guidance document entitled "Improving EPA Review of Appalachian Surface Coal Mining Operations Under the Clean Water Act, National Environmental Policy Act, and the Environmental Justice Executive Order" ("Guidance memo").[196] The Guidance memo, among other things, set a numeric standard for conductivity levels in streams affected by coal mining. Although labeled "interim final" guidance, the guidelines were to be applied to permit reviews "immediately." The "final" guidance was issued July 21, 2011.[197]

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[193] H. Oversight Comm. Staff Briefing by Army Corps of Engineers (June 28, 2011).
[194] Memorandum of Understanding Among the U.S. Dept of the Army, U.S. Dept of the Interior, and U.S. Envtl Prot. Agency Implementing the Interagency Action Plan on Appalachian Surface Coal Mining (June 11, 2009).
[195] Appalachian Surface Coal Mining Initial List Resulting from Enhanced Coordination Procedures, *available at* http://www.epa.gov/owow/wetlands/pdf/ECP_Factsheet_09-11-09.pdf.
[196] *See* Improving EPA Review of Appalachian Surface Coal Mining Operations Under the Clean Water Act, National Environmental Policy Act, and the Environmental Justice Executive Order, Environmental Protection Agency (Apr. 1, 2010), *available at* http://water.epa.gov/lawsregs/guidance/wetlands/upload/2010_04_01_wetlands_guidance_appalachian_mtntop_mining_detailed.pdf.
[197] Improving EPA Review of Appalachian Surface Coal Mining Operations Under the Clean Water Act, National Environmental Policy Act, and the Environmental Justice Executive Order, Environmental Protection Agency (Apr. 1, 2010), *available at* http://water.epa.gov/lawsregs/guidance/wetlands/upload/2010_04_01_wetlands_guidance_appalachian_mtntop_mining_detailed.pdf.

ii. Broken process

Federal agencies use guidance documents to reinterpret existing rules. Guidance documents are not subject to the rigorous notice and comment process required by the APA, but do not have a legally binding effect.[198] By contrast, if the document does have a legally binding effect and was not subjected to the notice and comment process, then it violates the APA. The analysis often turns on whether the rule effectively amended a properly promulgated rule.[199] It appears that EPA's Guidance Document, issued on April 1, 2010, violates this basic principal.

EPA Administrator Lisa Jackson called the Guidance "a sweeping regulatory action that affects not only all coal mining in the region, but also other activities with the potential to impact Appalachian stream quality."[200] Moreover, Administrator Jackson said, "[there are] no, or very few, valley fills that are going to meet this standard."[201] By definition, a guidance document should never be a sweeping regulatory action. Furthermore, new guidance that drastically decreases the percentage of the regulated community capable of meeting the standard effectively amends the existing rule. Accordingly, it appears that EPA issued the Guidance in violation of the APA when it failed to make these dramatic changes through the informal rulemaking process.

The U.S. District Court for the District of Columbia agrees. In its January 2011 opinion, denying a motion to dismiss and a motion for preliminary injunction, the court stated that the EC Memo and the Guidance "appear to qualify as legislative rules because they seemingly have altered the permitting procedures under the Clean Water Act by changing the codified administrative review process."[202] Furthermore, they "appear to be applied in a binding manner."[203]

In January 2011, EPA took its guidelines one step further. Rather than limit their application to just pending and future permits, EPA applied the guidelines to an already issued permit. Citing the Guidance memo and its authority under section 404(c), EPA revoked a permit, validly issued back in January 2007 by the Corps, for the Spruce No. 1 Mine in Logan County, West Virginia.[204]

iii. Impact

Under the EC Memo, Obama Administration officials choose certain Appalachian CWA permits for additional review by the Corps and EPA. This review goes beyond the normal scope of CWA permitting, subjecting the permit applicant to longer delays and effectively second-guessing the Corps' decisions on CWA permits. Initially, there were 79 permits on the enhanced

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[198] Connor N. Raso, *Strategic or Sincere? Analyzing Agency Use of Guidance Documents*,119 Yale L.J. 782, 789 (2010).
[199] *Id.*
[200] Pam Kasey, *EPA Sets Standards for Water Quality Below Mining Operations*, THE STATE JOURNAL, Apr. 2, 2010.
[201] *Id.*
[202] *Nat'l Mining Assoc. v. Jackson*, No. 10-1220, slip op. at 19 (D.D.C. Jan. 14, 2011).
[203] *Id.* at 16.
[204] Ken Ward, Jr., *EPA Vetos Spruce Mine Permit*, THE CHARLESTON GAZETTE, Jan. 13, 2011.

review list. Eight of those permits have been issued, 49 have been withdrawn, 22 are awaiting review on the list, and two are currently in active review.[205] The extreme delay caused by the new "enhanced review" process has led to a virtual permitorium -- new development and investment in the industry is near a standstill.

According to a Senate Environment and Public Works Committee report on these permits, the vast majority of the permits placed on hold by EPA belonged to small businesses applicants.[206] The permitorium has a greater adverse effect on small businesses because those businesses are not able to sustain themselves while they wait for EPA to evaluate and approve their applications. In fact, of the 49 withdrawn permits, many of the permit applicants have since entered bankruptcy because of their inability to wait out EPA's "enhanced review process."[207] The permits flagged for "enhanced review" are expected to produce over two billion tons of coal through operations and support roughly 17,806 existing and new jobs and 81 small businesses.[208]

Operators still trying to work within the system face dramatically more stringent standards under the Guidance memo. In many cases, EPA is expecting the operators to leave the water cleaner after dredging and filling operations are complete than it is today.[209] Improving water quality to a level not attained before the permitted activity even takes place is difficult if not impossible.

Further, the negative effects of unlawful rulemaking are compounded when the policy change leads to the retroactive revocation of validly issued permits. The regulatory uncertainty created by retroactive agency action is troublesome in light of today's economy. As Senator Joe Manchin warned, "What the EPA doesn't seem to understand is that this decision has ramifications that reach far beyond coal mining in West Virginia. The EPA is jeopardizing thousands of jobs and essentially sending a message to every business and industry that the federal government has no intention of honoring past promises and that no investment is safe. That message will destroy not only our jobs, but our way of life."[210] Now, more than ever, the EPA must not inappropriately impede investment and job security in the energy industry.

Surface and underground coal mining supports a significant amount of economic activity, stimulates economic growth and job creation in Appalachia, and provides affordable electricity to the region. The Appalachian region has 1,639 mining operations as of 2009, which employees 57,979 workers.[211] The job of a coal miner, while difficult, is well paying, with an average starting salary of $60,000 a year.[212] A Penn State University study found that every coal mining

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[205] H. Oversight Comm. Staff Briefing by Army Corps of Engineers (June 28, 2011).
[206] U.S. S. Comm. on Environment and Public Works, The Obama Administration's Obstruction of Coal Mining Permits in Appalachia (May 21, 2010).
[207] H. Oversight Comm. Staff Briefing by Army Corps of Engineers (June 28, 2011).
[208] U.S. S. Comm. on Environment and Public Works, The Obama Administration's Obstruction of Coal Mining Permits in Appalachia (May 21, 2010).
[209] H. Oversight Comm. Staff Briefing by Army Corps of Engineers (June 28, 2011).
[210] Press Release, Senator Joe Manchin: EPA's Unprecedented and Irresponsible Decision Jeopardizes our Economic Recovery and Jobs (Jan. 13, 2011).
[211] Coal Mining Productivity by State and Mine Type, 2009, *available at* www.eia.gov.
[212] Devin Dwyer, *Craving Coal Dust "Like Nicotine": Why Miners Love the Work*, ABCNEWS, Apr. 7, 2010, *available at* http://abcnews.go.com/US/Mine/west-virginia-coal-miners-allure-dangerous-profession/story?id=10305839.

job supports 11 other jobs in a local community – from truckers and railroad workers to equipment suppliers.[213] Using this calculation, the EPA's permitorium has a direct and indirect impact on over 162,000 jobs.

The personal accounts are even more disturbing. John Stilley, president of Amerikohl, a small coal company in Pennsylvania, testified before Congress and spoke about the impact of EPA's policy on his business. He said "it's taking us anywhere from probably 2 to 3 ½ years now to secure a permit. All the while, our coal mines, from start to finish, only last from 6 months to a year and a half."[214] Mr. Stilley's small business goes through approximately 10 permits a year in Pennsylvania.[215] This permitorium effectively hinders his business's ability to create jobs and stay economically viable. Similarly, Roger Horton, founder of Citizens for Coal, a non-profit organization that advocates for coal production in West Virginia and a member of Local Union 5958 of the United Mine Workers of America, has seen firsthand the "social and economic disruptions" in his community created by EPA's broken process.[216] While not directly affected by 404 permitting, Mr. Horton describes how a large surface mine in Logan County, West Virginia, was put out of business by EPA's regulatory interference. Not only did 400 members of Horton's Local 2935 union lose their jobs, the school system and social welfare programs suffered because of lost revenues.[217] Local businesses – gas stations, restaurants, repair shops, and equipment vendors – closed as residents moved to other states looking for work.[218] He describes families "suffering and disintegrating" as substance abuse and divorces increased in the community. Horton feels that the communities and families of Logan County have never truly recovered from the job loss that occurred because of this breakdown in EPA process.[219]

VI. ABUSE OF EMERGENCY RULEMAKING PROCESS—INTERIM FINAL RULES

Interim final rules go into effect immediately after publication, but are open for public comment for a specific period of time, and may be revised at a later time.[220] They are frequently issued as a result of a statutory obligation or emergency circumstance.[221] Yet, these rules are problematic because they promote uncertainty in the rulemaking process and limit public input. Job creators are forced to take action right away, but remain anxious that their regulatory requirements could change. The "grandfathering" interim final rule, discussed below, demonstrates this concern.

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[213] Adam Rose & Oscar Frias, The Pennsylvania State University, The Impact of Coal on the U.S. Economy (1994).
[214] *EPA's Appalachian Energy Permitoirium: Job Killer or Job Creator?: Hearing Before the Subcomm. on Regulatory Affairs, Stimulus Oversight and Gov't Spending of the H. Comm. on Oversight and Gov't Reform*, 112th Cong. (2011) (statement of John Stilley).
[215] *Id.*
[216] *EPA's Appalachian Energy Permitoirium: Job Killer or Job Creator?: Hearing Before the Subcomm. on Regulatory Affairs, Stimulus Oversight and Gov't Spending of the H. Comm. on Oversight and Gov't Reform*, 112th Cong. (2011) (statement of Roger Horton).
[217] *Id.*
[218] *Id.*
[219] *Id.*
[220] *See* Gen. Accounting Office, Federal Rulemaking: Agencies Often Published Final Actions Without Proposed Rules 16-18 (Aug. 1998).
[221] *Id.*

A. Internal Revenue Service, Department of Labor, and Department of Health and Human Servicers "Grandfathering" Joint Interim Final Rule

i. Rule and Purpose

President Obama promised that the Patient Protection and Affordable Care Act (PPACA) would allow individuals who like their current health insurance to keep it.[222] To make this possible, the PPACA included a grandfathering provision. Plans that meet the grandfathering criteria, although subject to some aspects of the law,[223] remain exempt from many of PPACA's mandates. The PPACA deferred to agencies, however, to provide details through regulatory rulemaking.

On June 14, 2010, the Internal Revenue Service, Department of Labor, and Department of Health and Human Services jointly issued an interim final regulation (IFR) to govern the applicability of the PPACA to health plans in existence at the time the PPACA was signed into law on March 23, 2010. This IFR was subsequently amended on November 17, 2010. According to the regulation, plans would remain grandfathered as long as they did not make any "significant" changes. However, it appears that vague definitions and lack of clarity in the rule are causing health plans to lose their "grandfathered" status and are creating uncertainty for job creators.

ii. Broken Process

The evolving nature of the grandfathering rule represents a significant flaw in the regulatory process. The regulation was issued in the form of an interim final rule, which—although not the final rule—became effective as written on the date of publication and prior to the solicitation and consideration of any public comment. The Administration accomplished this by invoking a statutory exception allowing it to forgo the customary notice and public comment process and opt instead for a shorter, less transparent process without meaningful public participation.[224] The Administration's failure to utilize a robust notice and comment rulemaking process shut job creators out of the process and created uncertainty regarding the status of many plans.

Further, the Administration has yet to issue a final rule,[225] so the rule could change at any time.[226] The IFR has already been amended once,[227] and can be further modified by issuing

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[222]U.S. Department of Health and Human Services, HealthReform.Gov, viewed September 8, 2011, available at < http://www.healthreform.gov/newsroom/keeping_the_health_plan_you_have.html>.

[223]Patient Protection and Affordable Care Act § 1251(a)(2)-(4); Interim Final Rules for Group Health Plans and Health Insurance Coverage Relating to Status as a Grandfathered Health Plan Under the Patient Protection and Affordable Care Act, 75 Fed. Reg. 34,538; 34,542 (June 17, 2010) (to be codified at 45 C.F.R. pt. 147) (*providing a table of PPACA provisions that apply to grandfathered health plans, which include prohibitions on excluding coverage for pre-existing conditions (PPACA § 2704), imposing limits to coverage (PPACA § 2711), and rescinding coverage (PPACA § 2712)*).

[224] 26 U.S.C. § 9833 (1996); 29 U.S.C. § 734 (1974); 42 U.S.C. § 2792 (1944).

[225]Nearly 10 months ago, in connection with the November 17, 2010 amendment to the July 14, 2010 interim final rule, the Administration stated that the final regulations on grandfathered plans would be issued "in the near future."

binding guidance whenever the Administration feels the need to do so.[228] The ad hoc process of issuing guidance serves as a backdoor method of imposing additional requirements, decreasing the public's input in the regulations that govern their actions and increasing uncertainty. These modifications can have significant impacts, as did the November 2010 amendment, which removed a prohibition on switching insurance providers.[229] In that regard, employers that changed providers under the original IFR relinquished their grandfathered status. Had the amended IFR been in effect when the provider change occurred, however, those plans would still be grandfathered today. Additionally, administrative guidance has often times been cloaked in such informal garb as website "FAQs,"[230] which catches employers off guard and generates questions about the guidance's legal relevance. Under this ephemeral set of standards, changes to grandfathered plans that are of no consequence today may violate future versions of the rule and result in forfeiture of that status tomorrow.

The Administration has also failed to provide job creators with any meaningful standard in the rule for determining whether a potential change in their health insurance would result in the forfeiture of grandfathered status. Instead, the IFR sets forth two standards: "significant" for those changes that will disqualify a plan from grandfathered status,[231] and "reasonable" for those changes that are deemed permissible.[232] Not only does the IFR leave these terms undefined, but the legal significance of these standards is questionable.

The "significant" and "reasonable" language can only be found in the rule's preamble. It is neither included in Section 1251 of the PPACA, nor in the text of the IFR. This is problematic because the only legally binding material is the regulation's text itself, not the preamble. The rule, therefore, lacks any legally binding standard to determine whether changes in a plan disqualify it from being grandfathered.[233] Without clear standards, job creators will have to

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See John S. Hoff, Heritage Foundation Backgrounder, Broken Promises: How Obamacare Undercuts Existing Health Insurance (2011), at < http://report.heritage.org/bg2516>.

[226] By contrast, under standard notice and comment rulemaking procedure, a final rule can only be repealed through additional notice and comment rulemaking.

[227] The prohibition on switching insurance providers was lifted by additional interim final rules issued on November 17, 2010. *See* Amendment to the Interim Final Rules for Group Health Plans and Health Insurance Coverage Relating to Status as a Grandfathered Health Plan Under the Patient Protection and Affordable Care Act, 75 Fed. Reg. 70114 (Nov. 17, 2010) (to be codified at 45 C.F.R. pt. 147).

[228] Interim Final Rules for Group Health Plans and Health Insurance Coverage Relating to Status as a Grandfathered Health Plan Under the Patient Protection and Affordable Care Act, 75 Fed. Reg. 34,538; 34,545 (June 17, 2010).

[229] Amendment to the Interim Final Rules for Group Health Plans and Health Insurance Coverage Relating to Status as a Grandfathered Health Plan Under the Patient Protection and Affordable Care Act, 75 Fed. Reg. 70,114; 70,116 (Nov. 17, 2010).

[230] FAQs have been issued on September 20, October 8, October 12, October 28, and December 22, 2010. U.S. Department of Health and Human Services, Affordable Care Act "Implementation FAQs", viewed September 8, 2011, *at* < http://www.hhs.gov/ociio/regulations/implmentation_faq.html>; *See also*, John S. Hoff, Heritage Foundation Backgrounder, Broken Promises: How Obamacare Undercuts Existing Health Insurance 5 (2011), *available at* <http://report.heritage.org/bg2516>.

[231] Interim Final Rules for Group Health Plans and Health Insurance Coverage Relating to Status as a Grandfathered Health Plan Under the Patient Protection and Affordable Care Act, 75 Fed. Reg. 34,541 (June 17, 2010) (to be codified at 45 C.F.R. pt. 147).

[232] *Id.*

[233] John S. Hoff, Heritage Foundation Backgrounder, Broken Promises: How Obamacare Undercuts Existing Health Insurance 4 (2011), *available at* http://report.heritage.org/bg2516.

navigate the new health insurance jungle with the constant threat of triggering a hidden land mine and inadvertently relinquishing grandfathered status.

iii. Impact

The IFR, and the manner in which it was issued, has created uncertainty about how to best proceed in a post-PPACA world. This uncertainty effectively prevents employers from negotiating affordable health benefits that their employees prefer, depriving businesses of an effective means of attracting talent and depriving families of more health insurance options. Restaurateur Larry Schuler echoed this concern about regulatory uncertainty before Congress, stating, "The uncertainty of the regulatory process and the many rules that are yet to be clarified and fully defined worry me . . . . Regulatory implementation is moving ahead at full-steam and it seems like a new requirement comes to light every day that is even more burdensome than the last."[234] Until the final rule is issued, job creators like Mr. Schuler are essentially left to guess which changes will ultimately be deemed permissible and hope for the best.

Further, the IFR restricts the ability of many employers to limit healthcare expenses to compensate for rising costs, such as choosing to offer a less costly plan. According to one news report, "[e]xperts say the new regulations make holding costs down even more of a [sic] challenge for small businesses: If they make changes in their current plans to save money, they risk losing their grandfathered status and will be forced to comply with new mandates that are expected to increase costs."[235] This is precisely the experience of pre-school franchise owner Gail Johnson. She testified before Congress that rising health care costs caused her to modify her employee insurance plan in a way that passed the heightened cost along to her employees in the form of an added deductible. She explained, "This change resulted in forfeiting our ability to 'grandfather' our health insurance plan. Moving forward, our plan must comply with all of the mandates required by PPACA each year as the law is implemented."[236] Therefore, Ms. Johnson must now decide between providing a mandated health care package to employees that may not prefer it, lowering wages or benefits to compensate for the increased health care costs, reducing her full-time staff to avoid being subject to the employer mandate, or opting to pay the corresponding tax penalty for non-compliance and allow employees to drop into state exchanges.

While the IFR illustrates a broken regulatory process, the impact of the regulation breaks a key presidential promise. According to HHS's own estimates, 80 percent of small businesses in the country will lose their grandfathered status by 2013.[237] Although just one example, Gail

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[234] *True Cost of PPACA: Effects on the Budget and Jobs Hearing Before the H. Comm. on Energy & Commerce*, 112th Congress (Mar. 30, 2011) (written testimony of Larry Schuler, on behalf of the National Restaurant Association at 3).

[235] Judith Messina, *Health Reform's Grandfathering Rules Likely to Raise Costs*, CRAIN'S NEW YORK BUSINESS, June 23, 2010, http://www.crainsnewyork.com/article/20100623/SMALLBIZ/100629939.

[236] *Impact of the Health Care Law on the Economy, Employers, and the Workforce Hearing Before the H. Comm. on Education and the Workforce*, 112th Cong. (2011) (written testimony of Gail Johnson, President/CEO of Rainbow Station, Inc. at 7).

[237] *See* Judith Messina, *Health Reform's Grandfathering Rules Likely to Raise Costs*, CRAIN'S NEW YORK BUSINESS, June 23, 2010, available at <http://www.crainsnewyork.com/article/20100623/SMALLBIZ/100629939>.

Johnson's assertion that "there remain many hurdles to successfully keeping the health plan our employees like" is similar to the sentiment being echoed across the country.[238]

VII. CONCLUSION

The examples in this report clearly counter the Administrations claims that they have the regulatory system under control and are engaged in reform. Regulatory agencies are failing to conduct thorough cost-benefit analyses as required by executive order and statute, leading to flawed rulemakings that unnecessarily burden businesses, small and large. Agencies are surpassing congressional intent and upsetting decades of regulatory precedent to push a decidedly partisan agenda. They are skirting the traditional regulatory process, resorting to sue and settle agreements, guidance documents, and interim final rules to avoid the usual notice and comment procedures. As demonstrated in the report, such actions have dangerous ramifications for our economy.

Already, the Federal Register is bursting at over 54,000 pages as the Administration continues to expand its regulatory reach into all facets of business and industry.[239] The rules that make up these pages, in addition to those still in the pipeline, could have untold and profound effects on our economic growth. At a time when private-sector jobs have steadily declined and unemployment remains rampant, the Administration must demonstrate its commitment to the small businesses and job creators who drive our economy. As this report illustrates, the present state of regulatory agencies only undermines the Administration's assertions that the President is serious about reducing the unwarranted regulatory burden on job creators. Until the President can reign in his out-of-control regulators, a broken government will remain.

[238] *Impact of the Health Care Law on the Economy, Employers, and the Workforce Hearing Before the H. Comm. on Education and the Workforce*, 112th Cong. (2011) (written testimony of Gail Johnson, President/CEO of Rainbow Station, Inc. at 7).
[239] Wayne Crews, *Obama's Anti-Jobs Agenda: Midyear Regulatory Reform Report Card Doesn't Look Good*, WASH. TIMES, Sept. 1, 2011.

About the Committee

The Committee on Oversight and Government Reform is the main investigative committee in the U.S. House of Representatives. It has authority to investigate the subjects within the Committee's legislative jurisdiction as well as "any matter" within the jurisdiction of the other standing House Committees. The Committee's mandate is to investigate and expose waste, fraud and abuse.

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