



Statement for the Record

**Business Roundtable
Before the
Subcommittee on the Efficiency and Effectiveness of Federal
Programs and the Federal Workforce
Committee on Homeland Security and Government Affairs
United States Senate**

**Hearing on
“A More Efficient And Effective Government: Improving the
Regulatory Framework”**

March 11, 2014

Business Roundtable, an association of chief executive officers who lead companies that operate in every sector of the U.S. economy, appreciates the opportunity to submit this statement for consideration by the Subcommittee on the Efficiency and Effectiveness of Federal Programs and the Federal Workforce. Our statement makes the case for a smarter regulatory system and a streamlined federal permitting process.

Nearly three-quarters of Business Roundtable CEOs list regulations as one of the top three cost pressures facing their businesses. Roundtable CEOs believe that a smarter regulatory system and a more streamlined federal permitting process will help drive increased business investment, economic growth and job creation.

As advocates for smart regulation, America's business leaders support efforts to make the federal regulatory process more transparent and open to public engagement, which will result in better information quality, smarter rules and more objective cost-benefit analyses.

Our recommendations outlined below:

- Call for greater and earlier public engagement in the regulatory process, better quality information, more objective cost-benefit analysis and completing the notice and comment process;
- Are substantially in agreement with the recommendations of the President's Council on Jobs and Competitiveness (Jobs Council);
- Advocate for a streamlined federal permitting process, which is supported by building trades unions and other broad-based business groups; and
- Call for new processes and procedures for conducting retrospective reviews of out-of-date and unnecessary rules.

Improving the Regulatory System

At present, U.S. businesses, both small and large, are increasingly burdened by the cumulative impact of regulations issued under the current process. While each of these rules was well intentioned, their collective effect has begun to hobble the U.S. economy:

- **Compliance costs money.** Federal agencies regularly issue rules costing hundreds of millions and even billions of dollars annually. These costs are added to businesses' ongoing compliance expenditures – expenditures that their foreign competitors may not have to make. It is crucial that regulatory requirements be justified, cost-effective and understandable.
- **Innovation is vital to our future.** American businesses are the world's most innovative, and that innovation maintains our competitive advantage and preserves our standard of living. Rules that require particular technologies or approaches or that fail to keep up with technological evolution can jeopardize future innovation.

- **Investment requires certainty.** If companies are uncertain what regulators will require or how to comply with rules, they will be reluctant to commit capital to new or expanded productive investments. But this sort of investment is key to growing our economy and providing good-paying jobs for all Americans.

Business Roundtable endorses legislation that would make the regulatory process more effective. The needed reforms fall into a handful of basic categories, each of which is addressed by one or more bills currently pending in Congress, most of them before the Homeland Security and Governmental Affairs Committee.

Greater and Earlier Public Engagement

Notice and comment rulemaking has been described as “one of the greatest inventions of modern government”¹ and represents the most important example of “crowdsourcing” by the federal government. But it can be improved. Right now, the first inkling most citizens may get of an agency’s thinking is when the agency publishes a Notice of Proposed Rulemaking in the Federal Register. Yet by then, the agency has already invested substantial resources in the option or options that it is proposing, and it can be difficult for an agency to change course significantly. A range of useful reforms could increase public engagement without changing the “rules” governing how agencies make decisions about the content of rules.

The most important reform Congress can make in this connection is to require agencies to give the public earlier notice of the problem they are trying to solve, so that those with the greatest understanding of the issues, and the potentially affected activities, can provide agencies with the benefit of that knowledge when agencies can still readily make optimum use of it. This can be accomplished in several ways:

- *Evergreen regulatory agendas.* Currently, federal agencies only update their “regulatory agendas” of ongoing rulemakings twice a year (only once in 2012), and usually months late. Congress should bring this important transparency mechanism into the 21st century by requiring agencies to update their agendas on a monthly basis. Agencies would also have to assign docket numbers to each rulemaking entry, so that interested persons wouldn’t have to wait for a notice of proposed rulemaking to offer input on achieving the goals of the rulemaking. The *Achieving Less Excess in Regulation and Requiring Transparency Act of 2014* – the *ALERRT Act* (Title I of H.R. 2804, currently pending before the Homeland Security and Government Affairs Committee would do this).
- *Notice of initiation.* Agencies’ regulatory agendas could contain information, and solicit input, on rulemakings initiated in the prior month. But the Federal

¹ Kenneth Culp Davis, *ADMINISTRATIVE LAW TREATISE* § 6:15, at 283 (Supp. 1970).

Register is still the ‘document of record’ regarding the regulatory process and the primary way by which the public learns about rules. Thus, it is appropriate to require an agency to publish a very brief notice there when it decides to initiate a major rulemaking. The notice need only:

- Explain in a few sentences the problem the agency is trying to solve;
- Indicate how members of the public could submit information and views to the docket; and
- Invite the public to submit proposed alternatives for accomplishing the agency’s objectives most effectively or at least cost.

The White House Office of Management and Budget (OMB) would not be expected to review, much less approve, these notices. The Senate version of the *Regulatory Accountability Act*, S. 1029, pending before this Committee, would require this.

- *Complete/electronically accessible administrative records.* A rulemaking must be supported by the administrative record, and commenters must have access to that record in order to comment effectively. Yet rules sometimes appear in the Federal Register (thus triggering the public comment period) before the agency has placed all the underlying analyses in the record. The *Regulatory Accountability Act* would require agencies to place in the electronic docket, by the date the proposed rule is published, all of the information received or considered by the agency in connection with the rulemaking up to that point. Agencies would be required to add promptly to the docket all information they receive subsequently from commenters. Agencies would have to seek comment on critical new information that they receive after the close of the comment period and that they intend to rely upon.
- *Minimum comment periods.* The *Administrative Procedure Act (APA)* does not establish a minimum length of time for public comment on a proposed rule. The *Regulatory Accountability Act* would establish two minimums:
 - 90 days for major rules; and
 - 60 days for all other rules.
- *Standards for guidance documents.* Legislation could set transparency-related standards regarding agency guidance documents (or subsets such as significant guidance documents or economically significant guidance documents). These include language to be used or avoided, electronic access, and notice and comment. The *Regulatory Accountability Act* accomplishes some of these goals; OMB’s Bulletin for Agency Good Guidance Practices could be another source of provisions.

Better Quality Information

A regulation can only be as good as the information on which it is based. The notice and comment process recognizes that members of the public generally have the best information about topics on which agencies plan to regulate. The regulatory system should enable members of the public not only to provide information, but also to help gauge the quality of the information upon which agencies rely (or propose to rely) – to ensure that it is the best available and meets fundamental quality standards.

The *Regulatory Accountability Act* would require agencies to adopt rules only on the best available scientific, technical or economic information. It would also establish a “mini-trial” process to resolve specific scientific, technical, economic or other complex factual issues that are genuinely disputed, where the resolution of those issues would likely have an effect on the costs and benefits of the proposed rule – minimizing judicial challenges later based on such disputes. Finally, the House-passed version of the bill (H.R. 2122, also referred to the Committee) would confirm that agency decisions on information quality occurring outside the rulemaking context are reviewable in court – a needed clarification.

More Objective Cost/Benefit Analysis

Cost-benefit analysis of economically significant rules issued by executive branch agencies, overseen by OMB, has been required by every administration, of both parties, for decades. Careful review of regulatory and non-regulatory alternatives is the only way to ensure that agencies only regulate when the benefits of regulation justify the costs, and that agencies adopt the least costly regulatory alternatives that meet the objectives of the underlying statute. Wherever possible, agencies should adopt performance-based rules and use economic incentives and publication of information in lieu of command-and-control approaches. Several approaches could improve agency analyses:

- *Codify EO 12866.* The *Regulatory Accountability Act* would codify current principles and standards for rulemaking. OMB would be required to issue guidelines regarding the assessment of costs, risks and benefits, and agencies would be required to provide reasoned explanations of how they evaluated the guidelines and other considerations specified in the bill.
- *Extend Executive Branch oversight to independent regulatory boards and commissions.* Currently, rulemaking by agencies like the SEC or the FCC is not subject to OMB oversight, even though the Administrative Conference of the United States, the National Academy of Public Administration and the American

Bar Association have supported such oversight.² S. 1173, currently before the Committee, would correct that inconsistency.

- *Promote replicability of cost-benefit analyses.* It could be extremely informative if interested persons could redo the cost-benefit analyses underlying economically significant rulemakings to explore the effect of making adjustments to either the data or assumptions on which they are based or the models they employ. Agency analyses are all supposed to follow common OMB guidance (principally Circular A-4). Nonetheless, these analyses typically do not contain enough disclosure regarding inputs or models for anyone besides their authors (including OMB) to replicate them. Legislation could require all agencies – at the time they propose or finalize a major rule – to disclose the data or assumptions and models they use to generate the analysis for that rule in sufficient detail that any technically competent person could recreate the agency’s analysis – and run variations on it.

Completing the Notice and Comment Process

Key to ensuring transparency and greater public engagement in rulemaking is the notice and comment process. Ways to improve that process include:

- *NPRM expiration.* Notices of proposed rulemaking never expire, and many have been left hanging fire for a decade or more. It can take agencies a long time to complete all the required analyses, and no one supports rushed rulemaking. But at some point the record becomes too stale to support a final rule. And agencies sometimes give proposed rules quasi-final status, giving them an inappropriate level of coercive force. For all these reasons, the *Regulatory Accountability Act* provides that proposed rules would expire after two years. If an agency wanted to maintain rulemaking, it would need to publish explaining why it needed up to another year to complete the rulemaking.
- *Ensuring that “interim rules” are truly interim.* The *APA* allows agencies to dispense with notice and comment for “good cause.” In some of those cases – i.e., where notice and comment would be impracticable or contrary to the public interest – agencies have developed the practice of issuing “interim” (or “interim final”) rules. Sometimes agencies will seek comment on these rules and then reissue them in final form – in fact, some agencies do this as a matter of course. But there is no legal requirement that agencies ever revisit interim final rules, and too often agencies do not. To prevent this situation, the *Regulatory Accountability Act* requires agencies to request comments on all interim rules.

² See Administrative Conference of the United States, Recommendation 88-9, “Presidential Review of Agency Rulemaking,” 54 Fed. Reg. 5207 (Feb. 2, 1989), ¶ 2; National Academy of Public Administration, “Presidential Management of Rulemaking in Regulatory Agencies” (Jan. 1987), American Bar Association, Recommendation 302 (Aug. 7-8, 1990).

The agency would be required to issue a revised final rule within 270 days of issuance of the interim rule (or within 18 months in the case of a major or high-impact rule). Otherwise, the interim rule would cease to have legal effect.

- *Midnight rules.* Administrations often rush out politically unpopular rules in their waning days. A new administration has no power to rescind these without going through a new rulemaking. The *Regulatory Accountability Act* would implement a recommendation of the Administrative Conference of the United States that would allow new administrations to quickly seek comment on newly finalized rules to determine whether to amend or rescind them.

Streamlining the Federal Permitting Process

Against the backdrop of continued subpar economic growth and unemployment rates that still are too high some five years after the current economic recovery began, policymakers have an obligation to identify and address factors that continue to impair economic growth and job creation. The federal permitting process is one of those factors. Poorly coordinated or duplicative permit application reviews; unenforceable or non-existent deadlines for review; and lack of clarity regarding what is expected of applicants can unnecessarily delay infrastructure projects. This increases project costs, introduces uncertainty and may result in cancellation of an investment and the loss of jobs associated with it. Excessive litigation can also stall needed projects, regardless of the merits of the suit. Business Roundtable highlighted these problems and proposed a suite of reforms in its April 2012 report, *Permitting Jobs and Business Investment*.

There is widespread agreement that the permit system is broken: We are not alone in identifying the federal permitting process as one in need of reform. The President, the President's Jobs Council, building trades unions and other broad-based business groups have called for improvements to the federal permitting process in order to accelerate job creation and build infrastructure needed for the 21st century.

Congress has recognized the need to accelerate the permitting process and overwhelmingly passed bipartisan legislation that included provisions to speed permitting of surface transportation projects (MAP-21, Pub. L. 112-141 (July 6, 2012)) and has adopted similar provisions for water projects in bipartisan House and Senate *Water Resource Development Act* bills currently pending in conference.

The President has initiated promising administrative steps to reform permitting: On March 22, 2012, the President signed Executive Order No. 13604, *Improving Performance of Federal Permitting and Review of Infrastructure Projects*, that is designed to: institutionalize best practices for coordination on permitting and review processes; develop mechanisms to better communicate priorities and resolve disputes; identify timeframes and agency responsibilities in reviewing applications; and utilize

information technology systems (Dashboard) to share environmental and project-related information with the public, project sponsors and permit reviewers.

Building on Executive Order No. 13604, on March 17, 2013, the President signed a Presidential Memorandum – *Modernizing Federal Infrastructure Review and Permitting Regulations, Policies, and Procedures* – directing federal agencies to prepare a plan for the comprehensive modernization of federal review and infrastructure projects with the goal of reducing aggregate timelines for major infrastructure projects by half, while also improving outcomes for communities and the environment by institutionalizing best-management practices.

While still a work in progress, Executive Order No. 13604 and the President’s *Modernizing Federal Infrastructure Review* memorandum have had some early success in reducing the time for permit review. For example, the Administration cites recent approval of the Tappan Zee Bridge replacement project in New York, which saved up to three years on the timeline of this multi-billion dollar project.

In a May 2013 Report to the President, *Rebuilding America’s Infrastructure: Cutting Timelines and Improving Outcomes for Federal Permitting and Review of Infrastructure Projects*, the authors indicated that of the 50 major infrastructure projects expedited pursuant to EO 13604 as of the date of the report, anticipated time savings for projects ranged from several months to several years. The authors also cite U.S. Army Corps of Engineers Civil Works project planning reforms that are expected to reduce average timelines for large complex projects, such as the Central Everglades Planning Project, from 10 years to three years or less.

The Administration’s initiatives resulting in the California Desert Renewable Energy Conservation Plan and the Western Solar Plan that provides a blueprint for utility-scale solar energy permitting in Arizona, California, Colorado, Nevada, New Mexico and Utah promise to make permitting on federal lands more expeditious and predictable while minimizing multiple use conflicts and environmental impacts.

Codification of reforms is needed: While the Obama Administration’s initiatives are promising, their effectiveness depends on continuous reviewing agency “buy-in” and management perseverance in ensuring that best practices are institutionalized and followed over the long term. Moreover, to date, most of the projects designated by the Administration for expedited review have been infrastructure projects they consider to be of national or regional interest. It remains to be seen whether best practices can be effectively propagated throughout government for projects of lesser significance. These reforms are important steps in the right direction, but they fall short of the permanent, government-wide adoption of best practices needed to make government work better, more efficiently and in a more coordinated way to improve the permitting process and community and environmental outcomes.

Senators Portman (R-OH) and McCaskill (D-MO) have introduced bipartisan legislation (S. 1397, *Federal Permitting Improvement Act*) that is modeled after MAP-21, the President's Jobs Council recommendations, the President's administrative initiatives and the Roundtable's 2012 report. The bill would largely codify, expand and make permanent the permit streamlining efforts by the President.

The Portman-McCaskill bill is designed to lead to: better agency coordination and deadline setting; improved transparency; and reduced litigation delays and uncertainty by reducing the opportunity for judicial review of permits associated with a covered project from six years to 150 days. It also would require a reviewing court, in considering a request for injunctive relief, to consider potential job or other economic losses from an injunction. Importantly, the legislation does not change the substantive standards or safeguards in any underlying law. It will improve and expedite the process for reaching a decision.

In short, the Portman-McCaskill bill will expand, codify and make permanent the permit streamlining efforts broadly acknowledged to be necessary. We believe this bill is an essential component of any comprehensive regulatory reform agenda.

Retrospective Review of Existing Regulations

Because of the considerable burden and costs associated with regulation, there have been multiple proposals for the re-evaluation of existing and sometimes longstanding federal regulations. The Code of Federal Regulations currently stands at 238 volumes consisting of more than 174,000 pages.

The accumulated and cumulative costs of regulation over time represent a genuine problem for our economy, as well as for individual companies and other regulated parties. Likewise, the problem of out-of-date rules, or unnecessary rules, is one that has important impacts. It is all too rare that agencies ask whether the original problem a regulation was issued to address has been solved or could be addressed more cost-effectively.

Over time, various administrations have sought to take various actions to address these concerns. President Reagan sought to do so with Executive Order 12291, and his Presidential Task Force on Regulatory Relief. President George H.W. Bush sought to do so through the Competiveness Council. President Clinton sought to do so in the National Performance Review. President George W. Bush did so through an Office of Information and Regulatory Affairs (OIRA) process inviting nominations to address existing rules. And President Obama did so through Executive Order 13563. Moreover, section 610 of the *Regulatory Flexibility Act of 1980* has long required periodic agency review of certain categories of rules with impacts on small entities.

What all of these efforts have shown is that retrospective review of existing regulations is a challenging task, and one not readily susceptible to across-the-board, “one-size-fits-all” approaches. Such reviews are not necessarily equally useful for all types of rules. For example, where rules involved high-sunk costs and high-transition costs, consideration of changes can itself be unhelpful. Moreover, new costs often have greater impacts than those from longstanding rules, to which regulated parties have already adapted. Nor should efforts to review old regulations distract from the vital need to focus on current and newly proposed rules – and a valid assessment of their costs and benefits – because the burdens associated with new rules are so often greater than those from the past.

Finally, an across-the-board requirement to reassess old rules would likely become a pro forma exercise that would not seriously engage the relevant stakeholders or interests. However, in some situations, retrospective review of existing rules is plainly necessary and helpful. When that is so, an important principle of reform is that the identification of such rules for review not be allocated solely to agencies themselves. Agencies lack the incentives and the resources to determine which regulations are most in need of such review. Moreover, agencies are inherently stakeholders in their own regulations, and not sufficiently neutral and dispassionate. Accordingly, reforms that would enable the public to nominate rules for retrospective reviews, or that would place such decisions in the hands of independent reviewers, are more likely to produce results beneficial to our economy and our society.

Business Roundtable is also continuing to review a number of pending legislative proposals that involve requirements for retrospective review of regulations. (Examples include S. 1390, the *Regulatory Improvement Act*, introduced by Senators King and Blunt, and H.R. ____, the *Searching for and Cutting Regulations that are Unnecessarily Burdensome Act of 2014* (SCRUB Act)). To date, the one legislative proposal that Business Roundtable has endorsed with a retrospective review requirement is the *Regulatory Accountability Act*, also referenced above. That bill at section 3(i) provides:

“(i) RIGHT TO PETITION AND REVIEW OF RULES.—

“(1) Each agency shall give interested persons the right to petition for the issuance, amendment, or repeal of a rule.

“(2) Each agency shall, on a continuing basis, invite interested persons to submit, by electronic means, suggestions for rules that warrant retrospective review and possible modification or repeal.

That provision would enable members of the public, including regulated entities, to identify rules in need of review, and would require agencies to solicit such input on a regular basis. While not a panacea, that provision in the *Regulatory Accountability Act* would be a small but useful part of necessary regulatory reform to improve our federal regulatory process. At the same time, it would not detract from the larger and more

urgent need to reform the manner in which new regulatory costs and burdens are imposed. The *Regulatory Accountability Act* addresses that in a highly constructive and bipartisan way.

Adequate Resources for the Office of Information and Regulatory Affairs

Another indispensable element to this sort of regulatory reform is to increase the resources available to OIRA within OMB. When OIRA was created in 1981, the office had a full-time equivalent (FTE) authorization of 90 staff members; this year that number is down to an all-time low of 44. Business Roundtable suggests that it is critical that OIRA be provided with additional staff resources.