

Senate Committee on Homeland Security and Governmental Affairs
“Federal Regulation: A Review of Legislative Proposals”

STATEMENT OF SENATOR ROB PORTMAN

June 23, 2011

Chairman Lieberman, Ranking Member Collins, I appreciate this opportunity to present my views today on the critical issue of improving our regulatory system.

At a time when our nation’s economy is still struggling — unemployment at 9.1%, first quarter growth at 1.4% — I believe there is a growing, bipartisan consensus about the need to reduce the barriers to job creation.

Excessive regulation is one of the most serious obstacles.

One recent estimate put the economic toll of all federal regulations at \$1.75 trillion dollars annually – more than the IRS collects in income taxes. Others have suggested this figure is somewhat lower, but by any measure this is a significant burden.

And I hear it personally from small businesses across Ohio — ‘We’d like to begin hiring, we’d like to expand, but the cost and the uncertainty of today’s regulatory environment is holding us back.’

I was encouraged by the words of President Obama’s recent executive order on Improving Regulation and Regulatory Review, Executive Order 13,563.

But I continue to be concerned about the direction this Administration is heading.

One way to get our arms around the problem is to focus on “economically significant” rules—those that have an annual impact on the economy of \$100 million or more. Federal agencies issue roughly 4,000 final rules every year, but only 50 to 70 of those are “economically significant” rules.

These regulations have the largest economic footprint and are most deserving of scrutiny.

The chart that we distributed [hold up] illustrates the regulatory trend in an interesting way. It shows the “economically significant” rules that are in development across all federal agencies. And as you can see, OMB’s 2010 Fall Regulatory Plan reported a total of 224 economically significant regulations in the pipeline – that’s a 60% increase from 2005 levels.

This isn’t a perfect measure of increasing regulatory burdens. But it is a window into the trajectory we’re now on — without real reform.

My approach to bringing some balance to the regulatory system is twofold.

First, I believe we must reform the way all agencies develop new rules—especially economically significant rules—by making the process more cost-conscious, more transparent, and more accountable. That’s the goal of the Unfunded Mandates *Accountability* Act, a bill that I introduced this month and pleased to be joined by 20 cosponsors.

Second, I think we should consider moving toward regulatory budgeting — a more systematic framework for tracking and controlling these large, unbudgeted costs that Washington imposes on the private economy every year. That’s a subject I’ve been working on recently and discussing with Senator Mark Warner, who is well-versed on these issues.

On the first point — process reform — my bill is designed to strengthen the Unfunded Mandates *Reform* Act of 1995 or “UMRA,” which I co-authored in the 104th Congress.

UMRA was a bipartisan effort to prevent Congress and federal regulators from blindly imposing major economic burdens on the private sector and on state, local, and tribal governments without weighing the costs and benefits.

My legislation would improve UMRA in 5 basic ways – and I have time today to give just a thumbnail sketch.

1. **Broader scope.** First, this bill would broaden the scope of UMRA to require cost-benefit analysis of economically significant rules – those that have an “effect on the economy” of \$100 million or more. Today UMRA is triggered only by regulations that require direct “expenditures,” and that has limited its

effectiveness. This revision would bring the scope of UMRA into line with the regulation review process overseen by OMB's Office of Information and Regulatory Affairs (OIRA).

2. **Stronger Economic Impact Analysis.** Second, this bill would strengthen the analysis that agencies perform before issuing major rules. It would require agencies to evaluate and (if possible) quantify the potential impact on jobs, and to consider market-based, flexible and non-governmental alternatives to regulation. That's consistent with President Obama's Executive Order 13,563, which called for a regulatory system that promotes job creation and instructed agencies to "identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior."
3. **Choose The Least Onerous Alternative.** Third, this bill would require agencies to select the "least costly, least burdensome, or most cost-effective" regulatory approach that achieves the policy goals set out by Congress. Today that choice is discretionary under UMRA. In this economic climate, the least we can ask of regulators is to ensure that the 50-70 or so most costly rules issued each year are not more costly than is necessary.
4. **Apply UMRA to Independent Agencies.** Fourth, this bill would extend UMRA's regulatory analysis to all independent agencies, such as the Securities and Exchange Commission and the newly created Consumer Financial Protection Bureau.

There is no principled justification for excusing these agencies from the basic cost-benefit rules that apply to all other federal regulators.

The rules issued by this "headless fourth branch" of government are currently exempt from cost-benefit review by OIRA, based on legal concerns about maintaining their independence from the White House.

But the exclusion from OIRA review is an even *more* compelling reason to bring independent agencies within the the cost-benefit framework created by Congress. These agencies are, after all, creatures of congressional enactment.

Extending cost-benefit scrutiny to independent agencies is a bipartisan idea that has been endorsed by, among others, our witness today, OIRA Administrator Cass Sunstein [Sun-STEEN] (in a 2002 law review article) and more recently by President Clinton's OIRA Administrator, Sally Katzen.

5. Judicial Review. Finally, our bill would improve enforcement of UMRA by permitting judicial review. Each agency's cost-benefit analysis, as well as its approach to less burdensome alternatives, would be reviewed under the arbitrary and capricious standard. Review under UMRA would be deferential, but it would ensure that agencies take their obligations under UMRA seriously.

No major regulation, whatever its source, should be imposed on American employers or on state and local governments without a careful consideration of the cost, the benefits, and the availability of less onerous alternatives.

I believe this bill would move us further toward that goal.

Mr. Chairman, thank you for the opportunity to offer a statement today, and I look forward to continuing to work with my colleagues on this committee on improving the regulatory process.