

**EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503**

**TESTIMONY OF
CASS R. SUNSTEIN, ADMINISTRATOR
OFFICE OF INFORMATION AND REGULATORY AFFAIRS
BEFORE THE SENATE COMMITTEE ON HOMELAND SECURITY
AND GOVERNMENTAL AFFAIRS
UNITED STATES SENATE**

JUNE 23, 2011

Mr. Chairman and Members of the Committee:

I am grateful to have the opportunity to appear before you today to discuss issues relating to regulation and regulatory review. I believe that we can achieve our shared goal, which is, in the words of Executive Order 13563, to “protect public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation.”

The basic framework for regulation and regulatory review comes, of course, from Congress. Relevant statutes establish both the sources and the limits of the rulemaking authority of particular agencies. Congress has also established the broader foundations for the exercise of regulatory authority through so-called “generic” legislation. The Administrative Procedure Act is the central document here insofar as it imposes general requirements for public participation in federal rulemaking (including a notice-and-comment period) and judicial review. Such review is available to test whether the agency has acted in conformity to law and also whether the agency has acted arbitrarily or capriciously. Three other enactments deserve particular attention:

1. Title II of the Unfunded Mandates Reform Act (UMRA) imposes important requirements on rules that impose annual costs of \$100 million or more (adjusted for inflation) on state, local, and tribal governments or the private sector. Those requirements involve, among other things, an assessment of costs and benefits and an accounting of various potential effects on the economy. Importantly, Title II also requires agencies to identify and consider a reasonable number of alternatives and to select the least costly, most cost-effective, or least burdensome alternative that achieves the objective of the rule (or explain why they did not).
2. The Regulatory Flexibility Act (RFA) is designed principally to protect small business from excessive regulation. The RFA emphasizes the importance of recognizing "differences in the scale and resources of regulated entities" and of considering "alternative regulatory approaches . . . which minimize the significant economic impact of rules on small businesses, small organizations, and small governmental jurisdictions." To promote its central goals, the RFA imposes a series of requirements designed to ensure that agencies give careful consideration to the effects of their regulations on small businesses and explore significant alternatives in order to minimize any significant economic impact on such businesses.

3. The Congressional Review Act is designed to provide Congress with the authority to oversee the rulemaking process and to “veto” rules it does not approve. Under the Act, agencies must submit reports on rules to each House of Congress. Congress has a period in which to assess such rules and if it chooses, to prevent them from going into effect.

These statutes, as well as the organic statutes for the regulatory agencies in the Executive Branch, provide robust opportunities for the public and Congress to have an opportunity to participate in the regulatory process.

While legislation provides the central sources and limits of rulemaking authority, important guidance is also provided by the President. For about thirty years, starting with President Reagan, both Republican and Democratic Presidents have required a process of interagency review of significant rules, overseen by the Office of Information and Regulatory Affairs (OIRA) and requiring careful attention to costs and benefits, to alternatives, and to avoiding unjustified burdens. That process has contributed to a situation in which – under both Republican and Democratic Administrations – the annual benefits of regulations far exceed their annual costs. (The benefits of regulation include not only purely economic benefits but also savings in terms of deaths and illnesses prevented; consider, as just one example, the fact that highway deaths are at their lowest level in sixty years, in part as a result of highway safety regulations.)

The most important recent guidance is Executive Order 13563, issued on January 18, 2011. In that Executive Order, President Obama laid the foundations for a regulatory system that protects public health and welfare while promoting economic growth and job creation. Among other things, and to the extent permitted by law, the Executive Order:

- Requires agencies to consider costs and benefits, to ensure that the benefits justify the costs, and to select the least burdensome alternatives consistent with obtaining regulatory objectives.
- Requires enhanced public participation.
- Directs agencies to take steps to harmonize, simplify, and coordinate rules.
- Directs agencies to consider flexible approaches that reduce burdens and maintain freedom of choice for the public.

As you are aware, the Executive Order also requires agencies to “look back” at existing Federal regulations. The requirement of retrospective analysis directs agencies to review their significant rules, and to determine, on the basis of that review, which of those rules should be streamlined, reduced, improved, or eliminated. One of the goals of this approach is to eliminate unnecessary regulatory burdens and costs on individuals, businesses both large and small, and state, local, and tribal governments.

Last month, and in compliance with the Executive Order, 30 departments and agencies released their preliminary plans. Some of the steps outlined in the plans have already saved hundreds of millions of dollars in annual regulatory costs, and over \$1 billion in savings can be expected in the near future. Over the coming years, the reforms have the potential to eliminate

billions of dollars in regulatory burdens on individuals, small businesses, state, local, and tribal governments, and other regulated entities. It is important to emphasize that while a great deal has been accomplished in a short time and substantial savings have already been achieved, the agency plans are preliminary. They have been offered to the public, and to elected representatives at all levels, for their views and perspectives. Agencies will be carefully assessing all comments and suggestions before they finalize their plans. We look forward to your input and help in improving those plans.

The Presidential Memorandum on Regulatory Flexibility, Small Business, and Job Creation is focused especially on the “essential role” of small businesses in the American economy. It directs agencies to consider methods “to reduce regulatory burdens on small business” through increased flexibility. Recall that under the RFA, agencies may consider such flexibilities as extended compliance dates, simplified reporting and compliance requirements, and partial or total exemptions. The Memorandum specifically requires agencies to provide an explanation when they do not offer such flexibilities in proposed or final rules. Another Presidential Memorandum, the Memorandum on Administrative Flexibility, is specifically designed to reduce unjustified burdens on State, local, and tribal governments.

A number of regulatory reform proposals are now under active discussion in Congress. In this period of economic difficulty, we start from common ground: It is especially important to reduce unnecessary costs and paperwork burdens, so that we can protect public health and welfare while promoting economic growth and putting Americans back to work.

The Administration is committed to achieving these goals, and to working with Congress, and with this Committee in particular, on that important task. With the recent announcement of the preliminary lookback plans, we look forward to working closely with you to deliver on the promise of the Executive Order, which, it bears emphasizing, is to protect public health and welfare while also promoting economic growth and job creation.

At the same time, our view is that, with the introduction of the President’s Executive Order, we now have the tools needed to maintain a smart and efficient regulatory framework. Existing statutes, outlined above, are designed to promote public participation, protect small business, reduce excessive costs, and allow a congressional check. Executive Order 13563, merely six months old, provides new guidance and discipline, designed both for the “flow” of new regulations and the “stock” of existing regulations.

We are particularly concerned that some regulatory reform proposals might have unintended adverse consequences. For example, while there is an important role for judicial review of regulations, a significant expansion of judicial review in rulemaking could create unintended complexity in the regulatory system, preventing important rules from taking effect. An increase in litigation and judicial authority might also increase regulatory uncertainty, which would be most unwelcome in the current economic situation. At the same time, additional litigation and uncertainty can undermine important safeguards of public health, welfare, and safety, including safeguards that prevent illnesses and deaths.

I might add in this regard that since 2009, this Administration has launched initiatives that have, among other things, promoted airline safety while protecting passengers from tarmac

delays, overbooking, and hidden charges; sharply reduced the risk of salmonella from eggs; and dramatically increased the fuel economy of the fleet, thus promoting energy independence while saving consumers a lot of money. At the same time, and there is absolutely no contradiction here, we are eliminating unnecessary regulatory burdens and tens of millions of hours in annual red-tape.

Other proposals, such as the REINS Act, would undermine our system by converting rules designed to implement congressional enactments into mere proposals. Such a transformation would not only increase uncertainty, but it would also undermine the implementation of countless statutes, while giving Congress no authority that it currently lacks. Recall that the Congressional Review Act enables Congress to overturn rules during the period for special legislative procedures established by the Act, and Congress always retains the authority to overturn rules at any subsequent point as well.

The Administrative Procedure Act, UMRA, the Regulatory Flexibility Act, and the Congressional Review Act, along with Executive Order 13563, provide strong foundations for a system that, to return to the opening words of that Executive Order, protects “public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation.” I would be happy to answer your questions.