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Congress of the United States

U.S. House of Representatives

Committee on Small Business

2361 Rayburn House Office Building
Washington, DC 20515-6315

To: Members, House Small Business Committee
From: Barry Pineles, Chief Counsel, Committee on Small Business
Re: Full Committee Hearing: "Eliminating Job-Sapping Federal Rules through Retrospective Reviews – Oversight of the President's Efforts"
Date: September 19, 2011

On Wednesday, September 21, 2011, at 1:00 pm in Room 2360 of the Rayburn House Office Building, the Small Business Committee will meet for the purposes of examining the President's Executive Order 13,563 (issued on January 18,2011), which requires federal agencies to develop plans for retrospective review of all their regulations. The plans mandated by the Executive Order were finalized on August 22 and the Committee will hear from the official overseeing compliance with these plans – the Honorable Cass Sunstein, Administrator of the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget (OMB).

Finalization of these plans is the start, not the end, of the review mandated under Executive Order 13,563. The question that remains is whether the procedures established in these plans will result in meaningful reduction in regulatory burdens, particularly for small businesses that create most of the new jobs in the United States.

Agency Exercise of Legislative Authority

Article I of the Constitution vests legislative authority in Congress.[1] That gives Congress the ability, in one form or another, to regulate the behavior of individuals and businesses.[2] However, Article II of the Constitution requires that the Executive branch ensure the laws are faithfully executed. The President could not do that single-handedly, so the expectation was that agencies would be formed to assist the President in carrying out the responsibilities in Article II.[3]

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[1] The extent of that legislative authority, such as the regulation of commerce among the states, is beyond the scope of this memorandum.

[2] D. KETTL & J. FESTER, THE POLITICS OF THE ADMINISTRATIVE PROCESS 336 (2005).

[3] U.S. Const. Art. II, § 2. That section provides that the President may receive opinions from principal officers of each of the Executive Departments and further authorizes Congress to grant the President the power to appoint lesser officers. The implication of both is that there will be federal agencies to ensure the laws are properly executed.

Congress, in exercising its legislative powers, can take two approaches. First, it can enact legislation that is highly proscriptive and details those behaviors that are permitted or prohibited. For example, the Consumer Products Safety Improvement Act[4] prohibits the sale of any children's product which contains more than 600 parts per million of total lead content by weight.[5] Further, Congress prohibits the use of American Society for Testing and Materials F963 if it is inconsistent with standards developed by the Consumer Product Safety Commission.[6] In contradistinction, Congress can exercise its powers through very broad amorphous standards, such as those contained in Title II of the Federal Communications Act, which prohibits rates for wireline telecommunications services that are unjust or unreasonable or discriminatory.[7]

In either of the instances noted above, as well as thousands of others too numerous to cite,[8] federal agencies must take action to clarify the Congressional language. Even though § 101 of the Consumer Product Safety Improvement Act is fairly explicit in delineating the products that cannot be sold, there are still a number of unresolved questions, such as when is the measurement taken or what happens if the lead is inaccessible to the children. Similarly, without some type of determination by the Federal Communications Commission (the agency delegated the responsibility of overseeing wireline services), providers would have no way of ascertaining on a priori basis whether their rates were lawful.

To resolve this problem, agencies must write rules interpreting the statutes authored by Congress. Administrative law cognoscenti refer to this as carrying out a legislative (or sometimes denominated as quasi-legislative) function.[9] From the inception of what scholars consider the first modern regulatory agency (the Interstate Commerce Commission) in 1887[10] through the New Deal, government agencies often utilized a welter of inconsistent and ad hoc rules for interpreting and executing the authority delegated to them by Congress. The growth of federal agencies and their responsibilities during the New Deal exacerbated the problem.[11] After an examination by a special committee, Congress responded by enacting the Administrative Procedure Act (APA or Act).

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[4] Pub. L. No. 110-314, 122 Stat. 3016 (2008).
[5] *Id.* at § 101(a)(2), 122 Stat. at 3016 (codified at 15 U.S.C. § 1278a(a)(2)).
[6] *Id.* at § 101(c), 122 Stat. at 3019-20 (codified at 15 U.S.C. § 1278a(c)).
[7] 47 U.S.C. § 201(b).
[8] For a list of regulatory statutes enacted in the 1970s that contain prohibitions on behavior, be it detailed proscriptions or broadly-worded prohibitions, see Pineles, *The Small Business Regulatory Enforcement Fairness Act: New Options in Regulatory Relief*, 5 COMMLAW CONSP. 29, 29 (1997).
[9] J. REESE, ADMINISTRATIVE LAW DESK REFERENCE FOR LAWYERS 75-78 (2005). In addition, federal agencies enforce statutes (generally referred to as their executive functions) and undertake trial-type hearings in exercising their so-called judicial functions. *Id.* at 73-75, 78. Executive and judicial functions are outside the scope of this hearing, which focuses on the retrospective examination of agency exercise of their quasi-legislative functions.
[10] *Id.* at 9.
[11] 1 K. DAVIS & R. PIERCE, ADMINISTRATIVE LAW TREATISE § 1.4 (1994).

The APA and Federal Agency Rules

The APA introduced standardized procedures throughout the federal government and provided a framework for distinguishing among the various legislative, executive, and judicial functions of federal agencies. *See Wong Yang Sung v. McGrath*, 339 U.S. 33, 43 (1950). The APA ensures that administrative policies affecting individual rights will be promulgated according to certain procedures in order to avoid unpublished ad hoc determinations. *See Morton v. Ruiz*, 415 U.S. 199, 232 (1974).

The Act establishes procedures for issuing rules. Before examining those procedures, it is necessary to define the term "rule." The APA defines a rule as:

> the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances thereof or of valuations, costs, or accounting or practices bearing on any of the foregoing.

5 U.S.C. § 551(4). This definition is sufficiently broad to include nearly every pronouncement an agency, other than those stemming from an adjudication (a trial-like proceeding),[12] may make without regard to the procedures used to develop that issuance. *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1021 n.13 (D.C. Cir. 2000).

However, not every rule from an agency has the same legal effect on the agency or the entity regulated by the agency. The procedures by which the agency promulgated the rule become critical to understanding its legal effects.

Section 553 of the APA lays out the procedures for promulgating a rule. The APA starts with a premise that every rule should be issued only after notice is given and the public has the opportunity to comment (referred to as "notice and comment rulemaking").[13] This overarching presumption is then promptly riddled with exceptions which threaten to consume the premise. Rules relating to the military or foreign affairs of the United States are not subject to notice and comment rulemaking.[14] Nor are rules relating to agency

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[12] Adjudications result in the issuance of orders. An order is something other than a rule. This circularity arises because the APA fundamentally defines agency issuances through the procedures used rather than what the pronouncement does. Essentially an order adjudges the rights of only one party (be it an individual or business) after an on-the-record hearing before an administrative law judge. While such orders may be useful for ascertaining the rights of similarly-situated individuals or entities, the order only has legal effect on the party that was involved in the adjudication, including the agency involved. J. REESE, ADMINISTRATIVE LAW DESK REFERENCE FOR LAWYERS 311-12 (2005).

[13] 5 U.S.C. § 553(a); *see Arizona v. Shalala*, 121 F. Supp. 40, 49 (D.D.C. 2000).

[14] 5 U.S.C. § 553(a)(1).

management, or personnel or to public property, loans, grants, benefits, or contracts.[15] The requirements of notice and comment rulemaking also do not apply when the agency is promulgating an interpretative rule,[16] issuing general statements of policy,[17] and utilizing the so-called "good cause exception."[18] Thus, only rules which do not fall under one of these exceptions must be issued pursuant to notice and comment.[19]

Regulations promulgated pursuant to the APA's mandate of notice and comment rulemaking are more equal than other rules[20] issued pursuant to the exceptions in § 553(b) of the APA. First, the regulations[21] establish binding obligations on both the agency and parties to be regulated.[22] Second, the establishment of a binding obligation

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[15] *Id.* at § 553(a)(2).

[16] An interpretative rule basically states what the agency thinks a statute means and serves as a reminder to affected persons of their statutory responsibilities. *General Motors, Inc. v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984). The fact that the rule is interpretative does not necessarily vitiate its binding effect on the persons subject to the agency's regulatory authority. Most of the regulations issued by the Internal Revenue Service ("IRS") are considered interpretative but most taxpayers are unlikely to take an approach not countenanced by the IRS. These regulations may bind parties but they do not create new substantive requirements that a regulated entity must follow. *See Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1308 (D.C. Cir. 1991). For example, the IRS is required to establish dates when payroll tax deposits are due. The statute simply provides that the IRS will establish those dates. The establishment of those dates by the IRS is not an interpretative rule because the IRS is not reminding the employer of the obligation to submit payroll taxes to the IRS but rather specifying the date upon which they are due and created liability if that date is not met. In short, it is impossible to establish an a priori rule delimiting interpretative rules from those that also bind parties but are subject to notice and comment rulemaking. One must examine the text of the rule and its statutory foundation before it can be determined whether the regulation is interpretative or legislative. The true distinction between interpretative rules and other binding rules that must be issued pursuant to notice and comment rulemaking is that courts do not give interpretative rules the same deference that they give rules that must be issued pursuant to notice and comment. *United States v. Mead,* 533 U.S. 218, 232 (2001).

[17] The APA does not define the term "general statement of policy." However, the courts have interpreted the phrase to mean an agency pronouncement "to the public of the policy which the agency hopes to implement in future rulemakings or adjudications." *Pacific Gas & Elec. Co. v. FPC*, 506 F.2d 33, 38 (D.C. Cir. 1974); *accord Panhandle Eastern Pipeline Co. v. FERC*, 198 F.3d 266, 268 (D.C. Cir. 1999). In short, general statements of policy do not create policies which bind the discretion of either the public or the agency. *Id.* at 269; *American Bus Ass'n v. United States*, 627 F.2d 525, 529 (D.C. Cir. 1980).

[18] The APA provides that notice and comment shall not apply when "for good cause [the agency] finds ... that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(3)(B). Normally, this exception is used by agencies when responding to an emergency situation, such as might occur in a federal response to the problems that faced the California electricity markets in 2001. However, there are instances, such as the meeting of the Federal Reserve's Open Market Committee, where notice and comment is fundamentally not useful and that Committee's determination is actually done under the "good cause exception." For a detailed explication of the "good cause exception" see *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1486 (9th Cir.), *cert. denied*, 506 U.S. 999 (1992).

[19] *Appalachian Power Co.*, at 1022.

[20] With apologies to George Orwell.

[21] They are typically called "legislative rules" by the courts and within the legal profession although that is somewhat of misnomer. Sometimes these regulations are also referred to as "substantive rules" which also is a misnomer. Ease of reference dictates selecting one of these misnomers, and henceforth regulations required to be issued pursuant to notice and comment will be referred to as legislative rules.

[22] *Id.* at 1022-23.

on the agency means that the agency *must follow its own legislative rules*.[23] Third, the courts, when reviewing a "legislative" regulation, give the agency substantial deference, i.e., it becomes very difficult to overturn a "legislative regulation" unless the regulation directly contradicts the language of the statute.[24] Most importantly, an agency's legislative rules, since they must be issued pursuant to notice and comment rulemaking, can only be repealed after providing the public with notice and comment.[25]

The APA is the primary, but not sole, directive in the process for issuing a rule. Additional procedures have been imposed by Congress and Presidents that focus less on actual process and more on the analytical requirements an agency must undertake before finalizing a rule, especially those that must be issued after notice and comment.

Analytical Requirements in the Rulemaking Process

After a nearly decade-long growth of the regulatory state during the 1970s, businesses were groaning under the weight of federal rules. The Federal Register had grown from a non-weighty publication for the arcana and obscuranta of the federal government to a 42,000 page blueprint[26] for regulating many aspects of modern American life. This crush of federal regulation was particularly troubling to small businesses.

The RFA

Congress responded to this burden on small businesses with, among other things, the enactment of the Regulatory Flexibility Act, 5 U.S.C. §§ 601-12 (RFA).[27] The RFA requires agencies to examine the impact of their proposed and final rules on small entities, including small businesses, and if they are significant on a substantial number of

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[23] *See, e.g.*, *Fort Stewart Schools v. FLRA*, 495 U.S. 641, 654 (1990); *Torrington Co. v. United States*, 82 F.3d 1039, 1049 (Fed. Cir. 1996). Of course, an agency also must follow its own procedural rules as well. *E.g.*, *Nelson v. INS*, 232 F.3d 258, 262 (1st Cir. 2000). The difference is that an agency's procedural rules can be changed without going through the notice and comment rulemaking process so those rules have "less" force and effect than legislative regulations.

[24] *Nationsbank, N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 257 (1995); *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 844 (1984). In short, if an agency has adopted a regulation, even if there are other equally reasonable means to draft the regulation and achieve the agency's statutory objective, the agency's regulation is upheld in court.

[25] *Motor Vehicle Mfrs. Ass'n of Amer. v. State Farm Mut. Ins. Co.*, 469 U.S. 29, 43 (1983). Agency pronouncements interpreting statutes using procedures other than notice and comment may or may not require notice and comment to modify them depending on whether the agency interpretation is longstanding. *Compare Paralyzed Veterans of America v. D.C. Arena, LLP*, 117 F.3d 579, 586 (D.C. Cir. 1997), *cert. denied*, 523 U.S. 1003 (1998) (noting that interpretative rules may require modification after notice and comment) *with Appalachian Power*, 208 F.3d at 1019 (noting that only legislative rules require modification through notice and comment).

[26] Since 1980, the Federal Register has nearly doubled in size, ballooning to an elephantine 82,590 pages by the end of 2010.

[27] Nearly coetaneous with the enactment of the RFA, Congress also passed the Paperwork Reduction Act (PRA), 44 U.S.C. §§ 3501-07. While a milestone piece of legislation and one in which Administrator Sunstein plays a vital role, the PRA remains only tangentially relevant to the issues at hand for the instant hearing.

small entities, examine alternatives that achieve the regulatory objectives in a less burdensome manner.

This special focus on small businesses is logical for four primary reasons. First, in most industries, the vast majority of businesses are considered small. Second, small businesses are disproportionately disadvantaged by federal regulations compared to their larger counterparts. Third, federal agencies often do not recognize the impact that such regulations will have on small businesses. Finally, small businesses create most of the new jobs in the country; if they have to divert scarce financial resources to unnecessary or overly burdensome regulations, economic recovery will be delayed.

While the RFA remains the primary analytical tool associated with an agency's exercise of its quasi-legislative power, it is not the only one. President Carter and all subsequent Presidents have imposed additional analytical requirements through the issuance of executive orders.

Executive Orders and OMB Analysis of Agency Rules

The D.C. Circuit, in *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981) stated that there is a "basic need of the President and his White House staff to monitor the consistency of executive agency regulations with Administration policy." *Id.* at 405. This power of the President to maintain consistency of agency regulations stems from the Article II grant of executive power to the President. *Id.* at 405 n.524, (citing *Myers v. United States*, 272 U.S. 52, 135 (1926)).

Presidents Carter, Reagan, Bush, Clinton, Bush, and Obama all issued either Executive Orders or reinterpretations of existing Executive Orders requiring additional analysis when agencies issued rules. While the orders or additional guidance on existing orders varied from President to President, they all had the common theme that benefits of rules should exceed their costs and that OMB[28] would review compliance with these additional analytical requirements.[29] President Obama, like his immediate predecessor, President Bush, utilizes Executive Order 12,866[30] first drafted by President Clinton, albeit with amendments and their own gloss.

Rules Covered by the Analytical Requirements

The RFA applies only to those rules that must be issued pursuant to notice and comment. In other words, the authors of the RFA wanted legislative rules analyzed under the RFA rather than every potential issuance from an agency that might fall under the rubric of a rule, as delineated in footnote 13 of *Appalachian Power*. The only exception to the

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[28] The Paperwork Reduction Act created OIRA and President Reagan assigned it responsibility to oversee compliance with his executive order on regulatory review. Every subsequent President has maintained that delegation to OIRA.

[29] A detailed exegesis on the various executive orders can be found in Copeland, *The Role of the Office of Information and Regulatory Affairs in Federal Rulemaking*, 33 FORDHAM URB. L.J. 1257 (2006).

[30] 58 Fed. Reg. 51,735 (1993).

analysis of legislative rules is the RFA applies to certain interpretative rules of the Internal Revenue Service. *See* 5 U.S.C. § 603(a).

Executive Order 12,866 only requires that significant rules forced to go through additional analytical requirements (of a regulatory impact analysis and cost-benefit assessment) as well as OIRA review. Significant rules are those required to be issued pursuant to notice and comment that: 1) will have a $100 million annual effect on the economy or adversely affect in a material way a sector of the economy; 2) creates a serious inconsistency or otherwise interfere with an action planned by another agency; 3) materially alter budgetary impacts or the rights and obligations of recipients of entitlements, loans, grants, or user fees; or 4) raises novel legal or policy issues. Exec. Order. 12,866, § 2(f), 58 Fed. Reg. at 51,738.

President George W. Bush required significant guidance documents to go through the analytical requirements and oversight mechanisms set forth in Executive Order 12,866.[31] Significant guidance documents were agency pronouncements that would not be considered legislative rules (i.e., statements of policy or interpretative rules) but would have impacts similar to those of significant rules. The amendment to Executive Order 12,866 recognizes what the D.C. Circuit stated in *Appalachian Power* – that an "agency's other pronouncements can, as a practical matter, have a binding effect." 208 F.3d at 1021. If such agency rules, even when not issued pursuant to notice and comment, can have serious consequences, then those effects should be assessed as if they were legislative rules.[32]

Application of Analytical Requirements to Small Businesses

The primary examination of economic impacts on small businesses and other small entities arises from the statutory requirements of the RFA. As a result, executive orders have not generally focused their attention on this sector of the economy. Nevertheless, § 1(b)(11) of Executive Order 12,866 includes an imprecation for federal agencies to draft regulation tailored to the size of business. 58 Fed. Reg. at 51,736. On January 18, 2011, President Obama issued a memorandum to federal agencies reiterating the importance of tailoring rules to reduce burdens on small businesses and complying with the RFA. 76 Fed. Reg. 3827, 3828 (2011).

As has been shown, the analytical requirements focus on assessing impacts of rules that are being proposed and finalized. In essence, the analyses mandated by the RFA and Executive Orders are future estimates of expected economic effects. A final rule ultimately may have a greater or lesser effect than the agency estimated. Effective

[31] Executive Order 13,422, 72 Fed. Reg. 2763 (2007) amended Executive Order 12,866 to add significant guidance documents wherever the term "rule" was used in that executive order.

[32] President Obama repealed Executive Order 13,422 on January 30, 2009 with the issuance of Executive Order 13,497, 74 Fed. Reg. 6113. Shortly thereafter, OMB issued a memorandum stating that significant guidance documents nevertheless remain subject to potential review by OMB. Memorandum M-09-13 from OMB Director Peter Orzag (March 4, 2009).

measurement of current economic effects requires agencies to retrospectively review their regulations. It is to that subject that we know turn.

Retrospective Review of Regulations

The term "retrospective review" is something of a misnomer. It does not look backwards at rules; instead it looks at currently extant rules and attempts to measure their current economic consequences. As with analytical requirements, there are both statutory and Presidentially-ordered retrospective reviews.

Retrospective Review under the RFA

Section 610 of the RFA mandates agency review of regulations that have a significant economic impact on a substantial number of small entities at least once every ten years from the date of promulgation. The periodic review concept embodied in § 610 makes sense. Small businesses, when complying with rules, must do so under current economic conditions – not those that were in existence when the rule was promulgated. The rules under current market forces could impose significantly greater costs on small businesses than estimated by the agency at the time the rule was promulgated. The periodic review then enables the agency to make corrective action to reduce burdens on small business without undermining the agency's statutory and regulatory objectives.

The Government Accountability Office (GAO) has done a number of studies of agency compliance with § 610 and found compliance sorely lacking.[33] GAO concluded that the problem relates to the amorphous standard of "significant economic impact on a substantial number of small entities" and the ability of agencies to interpret those parameters to avoid compliance with periodic review mandate of § 610.

While GAO's conclusion is correct, the problems with § 610 compliance are far more pervasive and endemic. Section 610 is drafted in a manner that enables an agency, once its review plan has been drafted (and they were to have been drafted shortly after the RFA was enacted more than 30 years ago), to review rules without ever producing any document demonstrating it had reviewed the rules. Nor does the RFA require the agency to demonstrate what standards it utilized to determine whether the review is based on a

[33] *See* REGULATORY FLEXIBILITY ACT: CONGRESS SHOULD REVISIT AND CLARIFY ELEMENTS OF THE ACT TO IMPROVE ITS EFFECTIVENESS (2006) (GAO 06-998T); REGULATORY FLEXIBILITY ACT: CLARIFICATION OF KEY TERMS STILL NEEDED (2002) (GAO-02-491); REGULATORY FLEXIBILITY ACT: KEY TERMS STILL NEED TO BE CLARIFIED (2001) (GAO-01-669T); REGULATORY FLEXIBILITY ACT: IMPLEMENTATION IN EPA PROGRAM OFFICES AND THE LEAD RULE (2000) (GGD-00-193); REGULATORY FLEXIBILITY ACT: AGENCIES' INTERPRETATIONS OF REVIEW REQUIREMENTS VARY (1999) (GGD-99-55); REGULATORY FLEXIBILITY ACT: IMPLEMENTATION OF THE SMALL BUSINESS ADVOCACY REVIEW PANEL REQUIREMENTS (1998) (T-GGD-98-75); REGULATORY FLEXIBILITY ACT: AGENCIES USE OF THE OCTOBER 1997 UNIFIED AGENDA DID NOT SATISFY NOTIFICATION REQUIREMENTS (1998) (GGD-98-61R); REGULATORY FLEXIBILITY ACT: STATUS OF AGENCIES' COMPLIANCE (1995) (T-GGD-95-112).

finding of significance at the time of promulgation or under current economic conditions.[34]

Presidentially-Ordered Retrospective Reviews

The statutory lacunae in the RFA undermine the potential benefits of periodic regulatory review. Every President from Carter to Obama has ordered such retrospective reviews to fill in the gaps in the RFA or simply to impose their own regulatory philosophy on the corpus of agency regulations.

The History of Retrospective Reviews

President Carter's order on regulatory review, Executive Order 12,044, 43 Fed. Reg. 12,661 (1978), mandated agencies to "periodically review their existing regulations to determine whether they are achieving the policy goals of this Order." *Id.* at § 4, 43 Fed. Reg. at 12,663. Shortly after taking office, President Reagan established a Task Force on Regulation that examined existing regulations to determine whether they were duplicative, overlapping, conflicting with other rules or inconsistent with statute or principles of sound regulation. Exec. Order 12,291, § 6(a)(5), 46 Fed. Reg. 13,193, ___ (1981). President George H.W. Bush, in a memorandum to federal agencies, mandated that they undertake, in 90 days, a review of regulations in order to identify unnecessary rules.[35] In Executive Order 12,866 and as part of the National Performance Review, President Clinton mandated a review of existing regulations.[36] President Clinton supplemented that with another a regulatory review (the results of which would coincide with the convening of the 1995 White House Conference on Small Business) to remove obsolete or unnecessary rules.[37] Although President George W. Bush never issued a memorandum directing a retrospective review, OIRA requested information from the public on existing regulations that should be reformed;[38] and those requests were supplemented by efforts of the Chief Counsel for Advocacy at the United States Small Business Administration to identify regulations that should be reformed or repealed.

There were seven separate reviews of existing regulations from 1978 through 2004. Despite these reviews, the burden of regulation on small business continues to grow and the length of the Code of Federal Regulation now takes up approximately 26 linear feet. GAO found that the reviews, while useful, rarely resulted in any changes to agency regulations.[39] One primary hindrance to effective review was that agencies did not know

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[34] H.R. 527, the Regulatory Flexibility Improvements Act of 2011 would correct the flaws in the periodic review provisions of § 610.

[35] Memorandum on Regulatory Coordination, 1 PUB. PAPERS 166 (1992).

[36] *See* Eisner & Kaleta, *Federal Agency Reviews of Existing Regulations*, 48 ADMIN. L. REV. 142, 158 (1996).

[37] Memorandum on Regulatory Reform, 1 PUB. PAPERS 304 (1995).

[38] GAO, REEXAMIING REGULATIONS: OPPORTUNITIES EXIST TO IMPROVE EFFECTIVENESS AND TRANSPARENCY OF RETROSPECTIVE REVIEWS 10 (GAO-07-794) (2007).

[39] *Id.* at 30-31.

how they would measure the effectiveness of their regulations or what data was needed to assess the effects (be they quantitative or qualitative) of their regulations.[40]

Given the ineffectiveness of past retrospective reviews, one might consider that efforts at retrospective review, particularly when ordered by the President would cease.[41] Yet, in derogation of George Santayana's steadfast warning concerning those who fail to learn from the lessons history,[42] President Obama issued Executive Order 13,563, 76 Fed. Reg. 3821 (2011) providing his take on the agency rulemaking process, including retrospective review.

The Current Retrospective Review

President Obama notes that Executive Order 13,563 is a supplemental gloss on Executive Order 12,866 and reiterates the primary principles of that order – a regulation should impose the least burden on society, net benefits of a rule should exceed net costs, and a rule, to the extent feasible, should be tailored to the size of the business. *Id.* at § 1, 76 Fed. Reg. at 3821.[43] The President also requires agencies, when drafting regulations, to obtain full public input, be open to innovative ideas and flexible approaches, and comply with his previous mandate on scientific integrity. *Id.* at §§ 2-5, 76 Fed. Reg. at 3821-22.

Most importantly, in § 6, President Obama mandates that agencies establish plans for retrospective review of regulations. *Id.* at 3822. The Order does not specifically mandate that the agencies report about specific rules to the President or the Administrator of OIRA. Instead, the Order requires agencies to establish procedures by which the agencies would, on an ongoing basis, review existing rules. The purpose of conducting the ongoing retrospective review is to examine rules that may be "outmoded, ineffective, insufficient, or excessively burdensome and to modify, streamline, expand, or repeal them..." *Id.*

The plans were finalized on August 22, 2011. They establish detailed procedure for conducting review of existing regulations, including incorporation of the RFA's periodic review mandate. The final plans total roughly 800 pages and run in size from under ten

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[40] *Id.* at 49.

[41] In a quotation frequently attributed to Albert Einstein, the definition of insanity "is doing the same thing over and over but expecting different results." The first printed statement of this comment is in RITA MAE BROWN, SUDDEN DEATH 68 (1983). It is unclear whether Einstein or someone else originated the quote.

[42] G. SANTAYANA, THE LIFE OF REASON: REASON IN COMMON SENSE 284 (1905). The quote (often misstated) is "Those who cannot remember the past are condemned to repeat it." Of course, this simply represents a pithier version of Thucydides' explanation for his authorship of the history of the Peloponnesian War, which he wrote so those that could use exact knowledge of the past as an interpretation of the future. THUCYDIDES, A HISTORY OF THE PELOPONNESIAN WAR 14 (Richard Crawley trans. 1876, ed. R.C. Feetham 1903) (Heritage Press 1974).

[43] The emphasis on tailoring rules was expatiated further in a companion Memorandum on compliance with the Regulatory Flexibility Act issued the same day as the Executive Order. *See* text following note 32, *supra*.

pages for some agencies to as many as 200 for the Department of Transportation.[44] In an effort to ensure compliance, the plans establish an individual in the agency responsible for seeing the plans carried out who is not directly involved with the drafting of regulations (usually someone in the General Counsel's Office). The plans do not represent the culmination of work but lay the groundwork, according to the plans and the Order, for an ongoing effort to retrospectively examine rules.

Even though the plans establish the ground rules for conducting retrospective reviews, some agencies also identified rules that need revision or are in the process of being revised in line with the principles outlined in § 6 of the Order. For example, the Department of Agriculture is revising certain regulations on its SNAP or supplemental nutrition assistance program to reduce paperwork burdens on local school systems, with an estimated paperwork savings of 113,000 hours per year.[45] Similarly, the Department of State is working to simplify and clarify the list of items on the United States Munitions List (specifying defense-related items that can be exported).[46]

A review of the final plans shows that, at least on a preliminary basis, regulations identified by the agencies for review and modification tended to be ones that improve the efficient management of government. Regulations that are unduly burdensome have not generally been identified in this finalization of the review plans. Of course, it is possible that rules, particularly those most burdensome to small businesses, will be reviewed at a later stage, as part of the retrospective review's incorporation of § 610 of the RFA. Nevertheless, it remains an open question whether truly problematic rules for small businesses will receive an appropriate examination.

Since the retrospective review stems from an Executive Order, it does not apply to independent collegial body regulatory commissions, like the Securities and Exchange Commission or the Board of Governors of the Federal Reserve System.[47] Those agencies are responsible for significant regulatory burdens, including the regulation of the country's telecommunications infrastructure and its capital markets, including implementation of Dodd-Frank. Given the uncertainty surrounding the potential consequences (both beneficial and adverse), it would make abundant sense to have these agencies prepare plans for conducting retrospective reviews so they can correct unforeseen problems or increase benefits associated with their rulemakings. Unfortunately, the President does not have the power to compel these agencies to comply with Executive Order 13,563.[48]

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[44] Due to the length of the plans, describing them, even in a shortened form, would extend this memorandum to Dostoevsky-length – a crime and punishment that this author will not impose on the reader. The plans are available in their entirety at http://www.whitehouse.gov/21stcenturygov/actions/21st-century-regulatory-system.

[45] UNITED STATES DEPARTMENT OF AGRICULTURE, FINAL PLAN FOR RETROSPECTIVE ANALYSIS 20 (2011).

[46] UNITED STATES DEPARTMENT OF STATE, FINAL PLAN FOR RETROSPECTIVE ANALYSIS 9 (2011).

[47] The issues surrounding executive branch control of independent regulatory agencies was discussed in the memorandum for the legislative hearing on H.R. 527. Memorandum from Chairman Graves on H.R. 527 at 4, 36. For the sake of brevity, that analysis will not be repastinated here.

[48] As already noted, H.R. 527 would strengthen the periodic review requirements in § 610 of the RFA. The changes made by the bill will apply equally to Executive branch and independent agencies.

Finally, the Executive Order does not specify which rules should be reviewed. As has already been noted, rules need not solely be those arising out of notice and comment. Significant guidance documents can have a binding effect on regulated entities. Yet only one agency, the Department of Transportation, plans to review such guidance documents. As a result, an agency that eliminates a legislative rule under a retrospective review could simply reimpose that through a guidance document. The Executive Order does not address this situation. This potential loophole may allow agencies to repeal or modify a rule in compliance with the Executive Order and then impose that same "requirement" through a guidance document. That would undermine the purpose of Executive Order 13,563 and the Memorandum on the Regulatory Flexibility Act reducing regulatory burdens, particularly those affecting small businesses.