



A BETTER WAY

OUR VISION FOR A CONFIDENT AMERICA

The Economy
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EXECUTIVE SUMMARY

The last recession ended in 2009, but the economy has been limping along ever since. Job growth has been weak. Household income has stayed put. Business investment has barely budged. In all this time, the economy has never grown by more than 3 percent in a single year. In fact, according to one report, only 7 percent of American county economies have fully recovered to their pre-recession levels. One likely contributor is the growing federal regulatory burden.

Sensible regulations can be compatible with a strong economy, and it is the federal government's responsibility to set clear, firm rules that all Americans can live by. But bad or unnecessary regulations can slow the economy down significantly, and the evidence suggests red tape is holding back the recovery. The federal government has taken very few outdated regulations off the books, while constantly adding new ones: 3,408 in 2015 alone. The American people now spend \$1.89 trillion every year just to comply with Washington's rules—approximately \$15,000 per household.

From health care and finance to manufacturing and energy, job creators spend more time jumping through hoops than expanding opportunities. For example, since the Dodd-Frank Act became law, our country has lost on average one community financial institution per day. All this red tape especially hurts small businesses, startups, and the energy sector—which are the engines of economic growth. It also puts American companies at a disadvantage against global competition.

The costs filter down to consumers, raising the price of goods and services and disproportionately hurting low-income households. Everything from electric bills to the price of a new car is higher than it would otherwise need to be. In some cases, useful products have been regulated out of usefulness or even existence. Any American who has had to struggle with today's fuel cans for their mowers knows this only too well, but they probably don't know that the Environmental Protection Agency has made it so.

Despite their substantial impact on the daily lives of the American people, federal regulations receive little scrutiny and few constraints. In fact, there are no limits on the amount of regulatory costs Washington can impose every year. None.

Clearly, it is time for serious and fundamental reform. Every step in the process needs to be revamped: whether to regulate, how to regulate, and follow-up review of regulations. Agencies should write regulations only when necessary, make them minimally intrusive, stay within the legal mandate, and avoid creating barriers for new and small businesses.

When regulating, agencies must take into account all costs—direct and indirect— including the impact on jobs and on low-income households. Scientific data used to support regulations must be done in the open, reproducible, and based on sound science. The process should include fair opportunities for public comment as well as judicial review. Paperwork should be kept to a minimum, especially for small businesses. Regulators should avoid locking in the status quo and thus blocking technological breakthroughs. Federal agencies must be required to consider the cumulative impacts of their actions.

It is time for Congress to take greater responsibility for federal regulations. Old laws that delegate broad and vague authority to regulatory agencies need to be revisited. Current regulations should be reviewed for possible reform or repeal. Congressional approval should be required for major new regulations. Congress should also consider a first-ever regulatory budget that would place limits on the amount of regulatory costs federal agencies can impose each year. Regulations are just another tax on our economy and citizens — agencies should not be able to level such new taxes at will and without restraint.

Building on the regulatory reform legislation already introduced, Republicans will address these and other concerns to ensure that federal regulations at all times promote the interests of the American people.

INTRODUCTION

By laying down simple rules that benefit all Americans, the federal government can preserve a clean environment, promote public health, and ensure strong and sustainable economic growth through fair and stable markets. But precisely because federal regulations have such a large impact on Americans' daily lives, they should be used sparingly. States in many cases do a better job, and should be encouraged to take the lead. Regulations done right can protect the public without adversely affecting the economy, but regulations done wrong can be a cure worse than the disease - killing jobs, harming consumers, and damaging businesses. Regulations disproportionately threaten small businesses and stops business creation and hiring.

On energy, the harmful effects of excessive federal regulation are readily apparent. The tremendous growth of domestic energy production has been one of the few economic bright spots. However, only on state and privately owned lands has the huge increase in oil and natural gas output occurred.¹ On federal lands—where there is extensive red tape—production has actually stagnated.² This alone proves state do a better job than the federal government of properly regulating and managing energy.

Unfortunately, the Obama administration is currently in the process of adding new regulatory burdens to state and private lands, such as those targeting methane emissions and hydraulic fracturing. As it is, America is the only nation on earth that places a considerable amount of its domestic energy supply off limits, and the “keep-it-in-the-ground” coalition in Washington is using the broken federal regulatory and legal system to make things worse.³

Federal regulation particularly hurts domestic manufacturers and other businesses competing in an increasingly globalized marketplace. Compliance costs in the U.S. are greater than those of many other nations and place American firms at a significant disadvantage.⁴ American companies should not be forced overseas--- taking their jobs with them--- because of bad regulations.

These costs trickle down to the consumer. They raise the costs of doing business, which results in higher prices for goods and services. For example, the Obama administration estimates that its motor-vehicle regulations will raise the cost of a new car by \$2,937 by 2025, and some independent analysts believe sticker prices have already risen by that much or more.⁵ These and other price increases disproportionately affect poor households because they spend more of their hard-earned dollars on heavily regulated products.⁶ Regulations can also deprive people of the products they need—like the only over-the-counter inhaler for asthma attacks to or a gas can that actually works.

Capital formation is a key driver of investment, productivity, and economic growth. Much of the regulatory burden on community financial institutions stems from the Dodd-Frank Act signed into law by President Obama in 2010. This sprawling piece of legislation is over 2,300 pages long and requires federal regulators to write some 400 rules. Its reach extends not only to every financial institution in the U.S., but to virtually every corner of the economy.

Many regulations designed for big banks are also applied to small community banks or credit unions, imposing compliance costs that many find unbearable. Smaller institutions lack the personnel and financial resources of larger firms. As a result, they are forced to exit business lines or merge with other institutions, decreasing competition and the quality of people's choices. Since Dodd-Frank became law, our country has lost on average one community financial institution per day.⁷

¹ CRS, <http://www.crs.gov/reports/pdf/R42432>

² Id.

³ See Greenpeace, <http://www.greenpeace.org/usa/global-warming/keep-it-in-the-ground/>.

⁴ Mercatus Center, Regulation and the International Competitiveness of the U.S. Economy, at http://mercatus.org/sites/default/files/intermtlcompetitiveness_Globerman_v1-0.pdf.

⁵ Salim Furth and David Kreutzer, Heritage Foundation, “Fuel Economy Standards Are a Costly Mistake,” (2016), available at <http://www.heritage.org/research/reports/2016/03/fuel-economy-standards-are-a-costly-mistake>.

⁶ A 10 percent increase in total regulations results in a .687 percent increase in consumer prices. Dustin Chambers and Courtney A. Collins, Mercatus Center, George Mason University, How Do Federal Regulations Affect Consumer Prices? An Analysis of the Regressive Effects of Regulation 20 (2016), available at <http://mercatus.org/publication/how-do-federal-regulations-affect-consumer-prices-analysis-regressive-effects-regulation>. See also Patrick A. McLaughlin, Mercatus Center, George Mason University, Regulations Increase Poverty (2016), available at <http://mercatus.org/publication/regulations-contribute-poverty>.

⁷ FDIC Quarterly Banking Reports and data from the Credit Union National Association

The good news is, there is a better way. We can achieve many of the same goals with a market-based approach or a state or local program. What federal agencies need more than anything else is some humility. At the very least, new and existing federal regulations can be modernized to inflict far less economic pain.

Real regulatory reform could be the economic boost we've been waiting for. House Republicans will continue to work for policies that make it easier to invest and produce in America with a more efficient federal regulatory system that encourages financial independence, while balancing environmental stewardship, public safety, and consumer interests.

MODERNIZING REGULATORY PROGRAMS

Central to modernizing the regulatory process is reforming the Administrative Procedure Act of 1946, which prescribes the baseline procedures for all federal rulemaking. Other cross-cutting reforms are of major importance as well. But in many cases, reforms should be tailored to the specific agencies and issues they address. House Republicans will pursue these reforms so our nation can restore prosperity and promote smarter, more effective government.

Every step of the process needs serious and fundamental reforms—from deciding whether to regulate, how to go about regulating, and subsequent review of regulations.

Whether to Regulate

Regulate only when the states are not better suited, or there is an identifiable market or major policy failure.

A federal agency should not issue a regulation unless it can identify a failure of markets or policy that requires an intervention. Astonishingly, however, research has shown that the identification of a systemic problem requiring regulation is chief among the steps on which agencies perform the worst in major rulemakings. White House rulemaking guidance has emphasized for years that each agency should identify the problem they're trying to address, its significance, and whether there's a compelling reason for a federal regulatory intervention before they begin to regulate. But agencies routinely earn a failing grade on this critical, first decision making step when their rulemakings are put to the test.⁸

Regulations in search of a problem need to stop. For instance, oil and gas production has increased dramatically over the last decade while methane emissions from those wells have been kept under control, due largely to private sector initiatives.⁹ And yet the EPA and the BLM are still trying to increase regulations of those very same emissions. Similarly, the Department of Transportation released a rule making significant changes to the regulations governing the number of hours that truck drivers can work in week, and did so despite very limited evidence—just one small-scale study—that new requirements were needed.

In other cases, agencies make no attempt at all to determine whether a new regulation is necessary. Many home appliances - including refrigerators, air-conditioners, water heaters, clothes washers and dryers, dishwashers, and furnaces - have been subjected to multiple rounds of successively tighter energy efficiency standards from the Department of Energy. DOE frequently initiates the subsequent rulemaking process immediately after the previous regulation takes effect, so there is no opportunity for feedback and thus no way of knowing whether the additional regulation is needed.

⁸ See Jerry Ellig, Mercatus Center, George Mason University, Ten Principles for Better Regulation (2013), available at http://mercatus.org/sites/default/files/Ellig_10RegPrinciples_v1.pdf; Jerry Ellig, Patrick A. McLaughlin, Mercatus Center, George Mason University, Quality and Use of Regulatory Analysis in 2008, *Risk Analysis*, vol. 32, No. 5 (2012); Jerry Ellig, Mercatus Center, George Mason University, Look Before You Leap: Improving pre-Proposal Regulatory Analysis (2011) (testimony before the House Committee on the Judiciary, Subcommittee on Courts, Commercial and Administrative Law), available at <https://judiciary.house.gov/files/hearings/pdf/Ellig%2003292011.pdf>.

⁹ ICF, http://www.ngsa.org/download/analysis_studies/NGC-Final-Report-4-25.pdf.

Case Study: Easing Review Periods of the Clean Air Act

While the Clean Air Act is over 40 years old, its last major revision was over 25 years ago. Since that time, states' problems with implementation have multiplied. For example, under the Clean Air Act's National Ambient Air Quality Standards (NAAQS) program, the EPA sets standards for criteria pollutants,¹⁰ including ozone standards that were set in 1971 and subsequently revised in 1979, 1997, 2008, and 2015.¹¹ Because the EPA did not issue implementing standards for its 2008 standards until 2015, states are now facing the prospect of implementing two different standards simultaneously.

These overlapping standards have resulted in part from the current statutory requirement that EPA review NAAQS no later than every five years. It takes longer than five years to implement these standards, so the statute forces EPA to develop a new standard before the agency has gotten very far implementing the old one, and without knowing whether a new standard is even needed. To address these concerns, limited changes have been proposed to facilitate more streamlined, effective implementation of standards and eliminate premature and unnecessary rulemakings.¹²

Pursue non-regulatory approaches, if feasible.

Federal agencies should also consider whether a non-regulatory approach will work. In many cases, incentive programs may allow an agency to reach its goals without placing undue burdens on Americans.

For example, the Farm Bill Conservation Programs provide farmers, ranchers, foresters, and landowners with voluntary, incentive-based financial and technical assistance for conservation practices. Through these programs, producers protect and restore water quality and supply, air quality, and wildlife habitat. They also can meet regulatory requirements while providing a safe and abundant food and fiber supply.

Similarly, the Department of Agriculture's National Organic Program provides a voluntary regulatory program for organic producers who choose to market their agricultural products under the USDA organic seal. The program is not mandatory for all agricultural products, but provides uniform standards, certification, and enforcement for the farmers and ranchers who choose to participate in the program.

Pursue and draw from state and local solutions

Everything doesn't need to be done by Washington. Federal agencies should defer to state and local governments whenever possible. The federal government should only regulate where there is a problem of national scope that states cannot address. These levels of government are closer to the people and better able to adapt responses to state and local needs. In addition, the collective power of 50 state laboratories of democracy of different conditions and all of their localities offers tremendous potential to come up with the best regulatory practices and test different approaches.

Case Study: State Revolving Loan Funds

A good example of the state solutions can be found with the Clean Water and Safe Drinking Water State Revolving Loan Funds. The funds are meant to help states and local governments meet the mandates of the Clean Water Act and the Safe Drinking Water Act. The laws designate the types of activities that the funds can support, and the EPA passes the grants through to the states who match the funding with their own state dollars. Each state then loans the funds out to individual water systems. This financing helps local governments repair and replace old water-treatment plants, upgrade systems to meet new standards, and clean up water supplies. But each state has the ability to tailor its program to meet its specific needs. States have worked on innovative financing solutions that have leveraged funding much further than the initial grant. States also have the flexibility to tailor financing solutions toward systems that service low-income communities, focus on a particular watershed in need of clean up, or target the greatest public health needs. The ability to try new activities and approaches has both made the program successful and injected new ideas into the environmental financing discussion.

¹⁰ Other criteria pollutants include particulate matter, sulfur dioxide, nitrogen dioxide, carbon monoxide and lead. See <https://www.epa.gov/criteria-air-pollutants>.

¹¹ Similarly, for [particulate matter](#), the agency has established standards in 1971, and revised them in 1987, 1997, 2016 and 2012.

¹² See HR 4775 available at <https://energycommerce.house.gov/hearings-and-votes/hearings/hr-4775-ozone-standards-implementation-act-2016>; see also <https://energycommerce.house.gov/hearings-and-votes/hearings/hr-4775-ozone-standards-implementation-act-2016>.

Case Study: Shot Clocks on Project Permitting

Federal regulators are often under no deadline to act on permit applications and can hold up projects indefinitely. The problem is not new, but this administration has taken advantage of this opportunity to place proposed projects in an extended state of limbo (e.g., the Keystone XL pipeline).

For example, it currently takes the BLM an average of 227 days¹³ to approve or deny a permit to drill on federal lands, while it takes states an average of 33 days.¹⁴ Companies seeking to develop energy resources on federal lands could be waiting months, even years, for permit review with no certainty and little transparency to be able to clearly track the regulatory process. Even states like California have common sense backstops for permit review. The California Division of Oil, Gas and Geothermal Resources must respond within ten working days or the permit is automatically approved.¹⁵ In North Dakota, if the Public Service Commission fails to act within ten working days to consider pipeline route adjustment applications within a designated corridor, the route adjustment is automatically deemed approved.¹⁶ The federal government has no such system and yet continues to collect millions of dollars in application processing fees and other cost recovery fees to review such projects.

In other cases, the federal government's propensity to regulate by fiat has added months and even years of regulatory review prior to permit review. When developing offshore lease tracts in the Arctic and the Gulf of Mexico, several companies have been required to jump through rigorous regulatory hurdles and additional information collections outside of the existing regulatory structure in order for their permit to simply be considered "deemed submitted."¹⁷ Only at that point does the federal agency start the clock to track permit approval timeframes.

In some respects, lengthy permitting delays are more damaging than timely rejections. With the latter, companies can at least consider their legal options or perhaps make modifications to their proposal and re-apply. Years-long delays also encourage some companies to simply give up and withdraw their applications. Uncertain timelines also wreak havoc on the ability to secure financing for projects, especially large-scale ones. When the federal government fails to review projects in a timely manner, American families, manufacturers and other businesses are the ones who lose out to these economic opportunities. In order to remain globally competitive, we must expect better of the federal government. If private businesses and states can adhere to predictable timelines, so too can federal agencies.

Taskforce Solution: House Republicans will continue to pursue agency-by-agency reforms to help overcome agency-specific inadequacies in identifying whether and when federal regulation is actually required; provide incentives to rely on non-regulatory approaches when they are more cost-effective; and to incorporate greater flexibility to rely on state and local regulatory approaches and adopt federal regulatory approaches based on what has already been proven to work in the states. This will also include legislation like the Regulatory Accountability Act of 2015, H.R. 185 introduced by Rep. Goodlatte, which includes within it a requirement for advance notice of proposed major rulemakings to increase public input and better identify less costly alternatives before costly agency preferences are proposed and entrenched. In addition, Rep. Olsen's H.R. 4775, the Ozone Standards Implementation Act of 2016, eliminates the unworkable and unnecessary five-year mandatory review period for air quality rules and extends it to ten years. H.R. 161 sponsored by Rep. Pompeo, the Natural Gas Pipeline Permitting Reform Act, applies North Dakota's shot clock approach to the federal natural gas permitting process. Also, Rep. Flores's H.R. 1647 - Protecting States' Rights to Promote American Energy Security Act, recognizes that many issues, like the regulation of hydraulic fracturing, are best addressed by state governments.

¹³ U.S. Crude Oil and Natural Gas production in Federal and Nonfederal Areas; CRS, February 26, 2016; p. 9.

¹⁴ [Federal Western Production Lags in the 'Red Tape Nation'; Western Energy Alliance, February 24, 2015.](#)

¹⁵ California Public Resources Code, Section 3203 (a)

¹⁶ [North Dakota Century Code 49-22-16.3](#)

¹⁷ In November 2013, Shell Gulf of Mexico Inc. submitted a Revised Exploration Plan for development in the Burger prospect of the Chukchi sea off the coast of Alaska. The Bureau of Safety and Environmental Enforcement then required "additional information" including a substantial, supplementary document known as an "[Integrated Operations Plan \(IOP\)](#)." The plan was a recommendation of a 2013 BSEE Report – and required information largely duplicative of an Exploration Plan. Nonetheless, in order to continue to move forward through the regulatory process and for the Exploration Plan to be "deemed submitted," Shell had to submit an IOP which was purely for BSEE staff review and not offered for public comment. Nearly two years later, after additional information requests and multiple environmental consultations, Shell's revised exploration plan was "deemed submitted" on April 10, 2015, and conditionally approved on May 11, 2015.

Stay within the Statutory Mandate

Federal agencies have every incentive to regulate – and then overregulate because writing regulations justifies their livelihoods and budgets. Rarely do agencies stop after they've achieved the original goal specified by law. Instead, they often come up with new reasons to expand old regulatory schemes beyond their intended limits. Critics call it mission creep or “empire building.”

While there are many examples, the most widespread one today surrounds global warming. Although Congress has not specifically granted any agency the authority to regulate on the basis of global warming, climate concerns have been used to breathe new life into many existing regulatory programs.

Case Study: NEPA Creep

The National Environmental Policy Act of 1969 (NEPA) requires a thorough examination of the environmental impacts for any major federal action such as a big construction or energy-production project requiring a federal permit. Unfortunately, over the years, the law has devolved from a fact-gathering process into one seemingly designed to delay and obstruct.¹⁸ It is one of the primary reasons why “there are no such things as shovel ready projects.”¹⁹

Making matters worse, draft guidance was recently issued under NEPA requiring agencies to separately incorporate greenhouse-gas emissions (GHG) data into the NEPA review because the actual GHG impacts of projects on the environment were trivial. The draft guidance is already being implemented by agencies into their NEPA regulations and used in courts, despite being legally unenforceable.

Task Force Solution: NEPA must be amended to prohibit the agency from circumventing the rulemaking process by issuing “guidance” and using the courts to enforce it. In addition, it must be clarified that NEPA does not allow for the establishment of “proxy” analysis, including substitution of GHG emissions, in the absence of environmental impacts.

Case Study: Clean Water Act Creep into Farming

Clean Water Act regulations explicitly exempt permit requirements for discharges associated with “normal farming, silviculture and ranching activities such as plowing seeding, cultivation, minor drainage, and harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices.” The law is clear.

However, the EPA and U.S. Army Corps of Engineers (ACE) have continued to regulate these activities through creative interpretations of the CWA. Specifically, these agencies interpret the term “normal” in the exemption to mean “existing and ongoing,” adding additional requirements never intended by Congress.

Under this interpretation, farmers who simply change crops can be subject to regulation. Even farmers forced to leave fields fallow due to drought would no longer be engaged in an “existing and ongoing” activity under the EPA/ACE interpretation.

The activities of the EPA and ACE go well above and beyond the law to impose these requirements, significantly expanding the jurisdiction of the Clean Water Act, and clearly exceed congressional intent. They are grabbing for powers they were not given by law.

Task Force Solution: Codify a complete prohibition on requiring permits for normal farming, ranching, and silviculture activities, as well as pond, ditch construction, and maintenance.

¹⁸ According to a 2014 study conducted by the National Association of Environmental Professionals, federal agencies took an average of 1709 days, or 4.7 years, to complete environmental impact statements. Costs for a full NEPA environmental analysis can cost millions of dollars. After an EIS is completed, major projects still face litigation that can drag on for years.

¹⁹ <http://www.cbsnews.com/news/obama-no-such-thing-as-shovel-ready-projects/>.

Taskforce Solution: Sunsetting of regulatory programs (and not just existing regulations) through the reauthorization process can be a useful tool towards removing the incentives to engage in mission creep. Less judicial deference to agencies is also important, as in most cases the regulatory rationale for mission creep depends on a strained interpretation of statutory authority that courts would reject, were they less constrained to defer to agency interpretations. Rep. Ratcliffe's H.R. 4768, the Separation of Powers Restoration Act of 2016 would help to accomplish this goal. There is additional discussion regarding these solutions in other Agenda Project Task Force Papers. A further discussion of this policy is included in the Better Way by Restoring Constitutional Authority.

Provide for a Regulatory Budget

Washington's regulatory bureaucracy rarely knows the financial costs of even the major regulations it issues. Additional controls need to be imposed. Since the regulatory system's costs rival or exceed the levels of ordinary federal spending and taxation, it only makes sense for Congress to decide whether the tools it uses to address federal spending and taxation—budgeting tools—can be applied effectively to the regulatory system.

For example, agencies often issue new regulations that cost far more than Congress intended when it passed the legislation authorizing them. One way to fix this problem would be to require Congress, when it passes new regulatory legislation, to prepare and report estimates of just how much the anticipated regulations to implement the legislation would cost. Those estimates could then form the baseline for assessing whether actual rules that agencies propose or finalize are consistent with congressional intent.

Congress could also institute a budget for regulations as it does for spending. This budget could apply to individual statutes or entire agencies. Under the latter approach, Congress would allocate to each regulatory agency a limit on the amount of regulatory costs that could be imposed each fiscal year. Once the budget limit is reached, the agency could not enact issue any more regulations, though there could be provisions allowing agencies to petition for an emergency increase. Agencies would be incentivized to focus on regulating only when necessary, only on their highest priorities or considering non-regulatory approaches. Under some variations, agencies could also earn credits for the costs of regulations they repeal, thus encouraging the review of existing regulations and the elimination of those for which the costs are no longer justified. Some nations have experimented with a one-in-one-out (or even one-in-two-out) policy in which any new regulation would require the repeal of an existing one.²⁰

But what Congress will need most of all is high-quality regulatory cost estimates. Since many agencies have a track record of understating the costs of their own regulations, these duties should be shifted to a more independent source of cost estimates.

Taskforce Solution: A number of regulatory budget bills have been introduced, and the recent House Budget Resolution outlined a proposal to subject regulatory costs to a budget.²¹ House Republicans will explore, through oversight and legislative development efforts in relevant committees, ways in which Congress can institute federal regulatory system budgeting tools that can tame runaway federal regulatory costs, beginning with initial cost estimates Congress can implement on its own.

Avoid Creating Unfair Barriers to Entry for New Businesses and Excessive Burdens on Small Business

Congress has long recognized that complying with regulations is a significant challenge for small businesses and entrepreneurs, which rarely have in-house legal counsel or regulatory compliance experts on staff. As a result, in 1980, Congress enacted the Regulatory Flexibility Act (RFA)²² to improve the quality of agency rulemaking and ensure that rules do not inadvertently or disproportionately harm small businesses.

The RFA requires federal agencies to assess the economic impact of new regulations on small businesses and consider ways to reduce significant compliance burdens.²³ It also requires federal agencies to conduct outreach to small businesses. Congress imposed special outreach requirements on the Environmental Protection Agency (EPA), the Occupational Safety

²⁰ UK Government, <https://www.gov.uk/government/collections/one-in-two-out-statement-of-new-regulation>; Government of Canada, <http://www.tbs-sct.gc.ca/hgw-cgf/priorities-priorites/rtrap-parfa/fofo-upu-eng.asp>.

²¹ http://budget.house.gov/uploadedfiles/fy2017_legislative_text.pdf, section 605.

²² The RFA uses the term "small entities," which includes small businesses, small not-for-profit organizations, and small governmental jurisdictions. This section uses the term "small business" for the sake of simplicity.

²³ 5 U.S.C. §§ 603-605.

and Health Administration, and the Consumer Financial Protection Bureau (CFPB). Before these three agencies propose regulations expected to have a significant economic impact on a substantial number of small businesses, they must conduct small business advocacy review panels to receive early input from small businesses.²⁴

Unfortunately, the results have been disappointing. Although the RFA has been on the books for over 35 years, agencies often fail to comply with the law's requirements by either inappropriately certifying rules as not having a significant economic impact on a substantial number of small businesses or performing inadequate analyses. According to a recent study, agencies prepared RFA analyses for only about 8 percent of rules finalized between fall 1996 and fall 2012.²⁵ In addition, numerous Government Accountability Office reports have demonstrated that the RFA needs to be modernized.²⁶ RFA non-compliance failures often stem from individual agencies' interpretations of the RFA's requirements, which differ from the long-standing positions of the chief counsel for advocacy at the Small Business Administration (SBA).²⁷

Court decisions have exacerbated this problem. For example, the United States Court of Appeals for the District of Columbia has concluded that an agency only needs to analyze the effects of a regulation on small businesses that are directly subject to it²⁸ even though the indirect effects of regulation could be devastating. The EPA and the United States Army Corps of Engineers (Corps) relied on these decisions and certified that the Waters of the United States rule would not have a significant economic impact on a substantial number of small businesses,²⁹ despite the significant and direct consequences for small businesses such as farmers, ranchers, and home builders who now will have to obtain costly Clean Water Act permits. Although the chief counsel for advocacy of the SBA sent the EPA and Corps a comment letter stating that the certification of the proposed rule was improper and urged the agencies to withdraw the rule,³⁰ the agencies proceeded to finalize the rule without complying with the RFA's requirements.

Taskforce Solution: The Committees on Small Business and the Judiciary have acted to address weaknesses in the RFA that have allowed agencies to creatively interpret the law's requirements to avoid compliance. In the 114th Congress, H.R. 527, the "Small Business Regulatory Flexibility Improvements Act of 2015" was introduced by Chairman Chabot of the Committee on Small Business. The legislation would strengthen and clarify a number of the RFA's provisions. House Republicans will propose similar legislation to improve the RFA and conduct robust oversight over agency compliance with the statute's requirements to ensure that federal regulators incorporate all the benefits of a healthy small business sector into their decision-making.

²⁴ Id. at § 609(b)-(d).

²⁵ Connor Raso, Agency Avoidance of Rulemaking Procedures, 67 Admin. L. Rev. 65, 69, 99 (2015).

²⁶ See U.S. Gov't Accountability Office, GAO 06-998T, Regulatory Flexibility Act: Congress Should Revisit and Clarify Elements of the Act to Improve its Effectiveness (2006); U.S. Gov't Accountability Office, GAO-02-491T, Regulatory Flexibility Act: Clarification of Key Terms Still Needed (2002); U.S. Gov't Accountability Office, GAO-01-669T, Regulatory Flexibility Act: Key Terms Still Need to be Clarified (2001); U.S. Gov't Accountability Office, GGD-00-193, Regulatory Flexibility Act: Implementation in EPA Program Offices and Proposed Lead Rule (2000); U.S. Gov't Accountability Office, GGD-99-55, Regulatory Flexibility Act: Agencies' Interpretations of Review Requirements Vary (1999); U.S. Gov't Accountability Office, T-GGD-98-75, Regulatory Flexibility Act: Implementation of the Small Business Advocacy Review Panel Requirements (1998); U.S. Gov't Accountability Office, GGD-98-61R, Regulatory Flexibility Act: Agencies' Use of the October 1997 Unified Agenda Often did not Satisfy Notification Requirements (1998); U.S. Gov't Accountability Office, GGD/OGC-97-77R, Regulatory Flexibility Act: Agency Use of the November 1996 Unified Agenda Did Not Satisfy Notification Requirements (1997); U.S. Gov't Accountability Office, T-GGD-95-112, Regulatory Flexibility Act: Status of Agencies' Compliance (1995).

²⁷ Compliance with the RFA is monitored by the chief counsel for advocacy of the SBA. 5 U.S.C. § 612. The chief counsel for advocacy is responsible for monitoring agency compliance with the RFA and advocates for the interests of small businesses as federal agencies develop new regulations.

²⁸ See *Michigan v. EPA*, 213 F.3d 663, 688-89 (D.C. Cir. 2000); *American Trucking Ass'n v. EPA*, 175 F.3d 1027, 1043-45 (D.C. Cir. 1999), *aff'd in part and rev'd in part on other grounds sub nom., Whitman v. American Trucking Ass'n*, 531 U.S. 457 (2001); *Mid-Tex Elec. Coop., Inc. v. FERC*, 773 F.2d 327, 340-43 (D.C. Cir. 1985).

²⁹ Clean Water Rule: Definition of "Waters of the United States"; Final Rule, 80 Fed. Reg. at 37,054, 37,102 (June 29, 2015).

³⁰ Letter from the Hon. Winslow Sargeant, Chief Counsel for Advocacy to the Hon. Gina McCarthy, Administrator, EPA and Maj. Gen. John Peabody, Deputy Commanding General, Civil and Emergency Operations, Corps (Oct. 1, 2014), available at <https://www.sba.gov/advocacy/1012014-definition-waters-united-states-under-clean-water-act>.

Case Study: Make Small Business Capital Formation a Focus for the SEC

Reforming the focus of regulators: In passing the bipartisan Jumpstart Our Business Startups (JOBS) Act in 2012, Congress recognized the importance of entrepreneurs and innovative companies to the American economy by encouraging the Securities and Exchange Commission (SEC) to expand its mission beyond its traditional approach to securities regulation. Unfortunately, the JOBS Act was never a priority for the SEC. The SEC unnecessarily delayed the adoption of rules to expand access to private capital offerings or imposed undue burdens in the final rules to limit the JOBS Act's success. The SEC has a statutory mission to facilitate capital formation, but if the SEC continues to disregard capital formation, it is incumbent upon Congress to direct the SEC to prioritize it. It took until more than four years after its enactment for the SEC to finally complete all JOBS Act rulemaking mandates.³¹ This kind of delay must not be repeated.

Enhancing SEC Responsiveness to Small Business: In 1980, Congress required the SEC to conduct an annual government-business forum to review the current status of problems and programs relating to small business capital formation. The forum has generated a number of sound recommendations that the Financial Services Committee has used to develop legislation, including many provisions of the bipartisan JOBS Act. Unfortunately, the SEC has generally ignored this advice. In response, Rep. Bruce Poliquin has sponsored H.R. 4168, the Small Business Capital Formation Enhancement Act. This bipartisan and common-sense bill requires the SEC to pay closer attention to the needs of small businesses and respond publicly to any recommendations put forth by the forum that are within the SEC's jurisdiction. Rather than continue to neglect the needs of small businesses, H.R. 4168 will require the SEC to act on recommendations that will help small businesses and startups access the capital markets.

³¹ <https://www.sec.gov/news/pressrelease/2016-81.html>

Case Study: Growing Small Businesses

Fewer roadblocks to capital formation will unleash the energy of small businesses and allow job creation to flourish.

Improving Access to IPOs: To help new companies access the public capital markets, Title I of the JOBS Act created a new category of issuers known as “Emerging Growth Companies” (EGC) and helped them gain access to public capital markets at lower cost. In 2014, 291 IPOs went effective. That represents a 28 percent increase in the number of IPOs over 2013 and a 118 percent increase over 2011. EGCs accounted for more than 85 percent of all IPOs since the enactment of the JOBS Act.³² The JOBS act facilitated this rapid growth, including through the extremely important provision of the JOBS Act allows for EGCs to submit a confidential draft registration statement to the SEC.

Modernize Business Development Company Rules: Business Development Companies (BDCs) are investment funds that make investments in small and developing businesses and financially troubled firms.³³ They fill a niche for companies too big for local banks, but too small to access public debt and equity markets. Despite the important role that BDCs play in helping to fund small and middle market businesses, the BDC regulatory regime has not been modernized since its adoption in 1980. Since the SEC has failed to use its authority to update the regulatory regime for BDCs, Congress must act to modernize BDCs’ regulatory requirements to permit them to deploy much-needed capital and managerial assistance to small and middle-market businesses. H.R. 3868, the “Small Business Credit Availability Act,” sponsored by Rep. Mick Mulvaney, modernizes the BDC regulatory regime by streamlining the offering process, updating proxy rules, and expanding access to capital. These changes will enable BDCs to deploy significantly more capital to small and mid-size businesses, while simultaneously reducing the risk.

Help Community Banks Raise Capital: Small bank and thrift holding companies face unique challenges with regard to capital formation. The environment in which these financial institutions operate has become more challenging with massive increases in the regulatory burden. For example, community banks and their holding companies are currently subjected to arbitrary capital rules and other regulations that hurt their ability to fuel economic growth and job creation in the communities they serve. H.R. 3791, introduced by Rep. Love would make it easier for small community banks to raise capital and issue debt in order to make acquisitions and form new bank and thrift holding companies and would help ensure the nation’s smallest financial institutions can continue to lend in their communities and serve their customers.

³² Ernst & Young, The JOBS Act: 2014 Mid-Year Update, Aug. 2014, available at: [http://www.ey.com/Publication/vwLUAssets/EY-the-JOBS-Act-2014/\\$FILE/EY-the-JOBS-Act-2014.pdf](http://www.ey.com/Publication/vwLUAssets/EY-the-JOBS-Act-2014/$FILE/EY-the-JOBS-Act-2014.pdf).

³³ Small Business Investment Incentive Act of 1980 (P.L. 96-477).

Facilitating Interstate Commerce

In general, federal regulations should be a last resort and minimally intrusive; however there are instances where they make sense because they facilitate interstate commerce.

Case Study: Food Labeling

Agricultural biotechnology is one of the important tools available to producers to cope with an increasing world population and increasing production risks in the 21st century. Despite the need for this technology, a vocal minority of citizens are creating doubt in the minds of many consumers and policymakers through misinformation about the safety of genetically engineered inputs. This misinformation is influencing policymakers at the local, state, and federal levels and could threaten our farmers' ability to feed an ever-growing population and increase the cost of food for consumers.

Over the past several years, political activists in a growing number of states have tried to pass ballot initiatives and legislative proposals that would require labeling of certain foods that contain genetically engineered (GE) ingredients. In November 2014, voters in Oregon and Colorado defeated mandatory labeling initiatives. In previous years, voters in California and Washington have defeated similar proposals. To date, Vermont is the only state that has passed a unilateral labeling law, which is scheduled to take effect July 1, 2016, although it is currently being challenged in court.

Food supply chain stakeholders are navigating the consequences of mandatory labeling laws. Farmers have to segregate non-GE crops from GE crops and use more water and pesticides. Food manufacturers have to set up separate food processing units and warehouse space—not to mention plot additional transportation routes for products. All of these additional steps would add up to higher costs for farmers, manufacturers, and consumers. According to a recent study, state labeling laws would lead to a \$500 increase in grocery prices for the average family of four.

Task Force Solution: Rep. Pompeo sponsored H.R. 1599, The Safe and Accurate Food Labeling Act, which passed in the U.S. House of Representatives in July 24th. This legislation will create a consumer-friendly, science-based, uniform food-labeling framework for products using genetically engineered ingredients. By ensuring that food labeling is the sole purview of the federal government, the bill guarantees that state labeling mandates do not mislead consumers. Additionally, the bill will prevent the costly price hikes associated with a patchwork of state labeling laws.

Case Study: Transportation

Getting the goods that American businesses produce to consumers here and abroad involves moving them on a transportation network that crosses hundreds of state and local jurisdictions. One of the fundamental reasons our nation was founded as a union of states was to provide for a single authority with the power to uniformly regulate commerce among the states and foreign nations. The federal government must exercise its jurisdiction over the safety of interstate commerce to guard when necessary against a confusing and contradictory patchwork of regulations from 50 different states. For instance, when transporting certain hazardous materials, federal standards establish the diamond-shaped warning signs, or “placards”, that must be affixed to the particular vehicle. These placards are an integral part of a uniform system of communicating the presence of a product and its dangers to emergency responders in the event of an incident. Because of this uniformity, regardless of where an incident occurs, emergency responders can easily identify the dangers posed. Preempting a patchwork of conflicting state regulations makes sense here, and actually reduces regulatory burdens on industry where the truck or rail car may cross numerous state lines.

Unfortunately, agencies do not always exercise their preemption authority and many times activist courts strip their authority away. When this happens, it creates tremendous uncertainty for business. For instance, vessels moving freight and commodities along our rivers and coastline must take on and discharge ballast water to ensure the stability and safety of the vessel. Despite the fact that the Coast Guard has regulations in place to regulate ballast water discharges, activist courts have ruled that states can issue their own regulations. As a result, over 26 states have now issued contradictory regulations governing ballast water discharges.

When federal regulation makes sense, there should be a single, uniform, nationwide approach to safety regulation to provide regulatory certainty for businesses and facilitate the flow of interstate commerce.

How to Regulate

Include All Costs in Rulemakings, Including Impact on Jobs and Low-Income Households

Missing from most regulations is a full accounting of the direct and indirect costs. Regulators often go to great lengths to quantify direct and indirect benefits (including highly speculative ones), but fail to make the same effort for costs, which paints a misleading picture of a regulation's actual consequences. In particular, the adverse impact of regulations on jobs and on low-income households is understated and sometimes ignored entirely.

The impacts can be significant. Rules impose costs and those costs have to come from somewhere, including payrolls. Most obvious are the job losses at businesses whose closures are due, at least in part, to regulatory costs. But ongoing businesses are also impacted by growing regulatory burdens that may result in layoffs or foregone expansions. According to the U.S. Chamber of Commerce, delayed projects in the energy industry alone may be responsible for up 1.9 million lost jobs.³⁴

The coal industry has been particularly hard hit. Mine closures and coal-fired power plant shutdowns have reduced employment, including an estimated 49,000 jobs lost over the five-year period of 2008-2012.³⁵ For its Clean Power Plan, EPA itself has estimated job losses up to 34,000 (the agency claims greater job gains elsewhere) in 2030.³⁶ However, as of the end of last year utilities had already announced the retirement of 410 units in 37 states, representing nearly 67,000 megawatts (MW) of electric generating capacity closures attributable to EPA policies, suggesting greater job losses.³⁷ Beyond the coal sector, the resultant higher energy costs reverberate throughout the economy and suppress yet more jobs.

Many other sectors have also been targeted. Proposed regulations for boilers were estimated by the regulated community to put 224,000 jobs at risk, including 20,000 jobs in the pulp and paper industry alone.³⁸ Similarly, proposed rules for the cement sector put at risk an estimated 4,000 direct jobs, and another 12,000 to 19,000 jobs in the construction industry due to higher cement and concrete costs.^{39 40}

Job losses disproportionately hurt the poor, as these are the people most in need of improved employment opportunities. But regulations also hurt low-income households by raising the cost of energy, and thus reducing the amount that can be spent on food, housing, healthcare, and other basic necessities.⁴¹ For EPA's Clean Power Plan alone (which was recently stayed by the Supreme Court), there were 40 states projected to experience double digit increases in retail electricity rates from 2017 to 2031.⁴² Such increases, combined with the cost of other regulations, will disproportionately burden low-income households, who spend a much larger percentage of their incomes on energy than middle- and higher-income households.⁴³

Beyond energy costs, regulations that raise the cost of goods also disproportionately hurt low-income households. For example, EPA's greenhouse gas emission rules for cars will raise the cost of vehicles by a government-estimated \$2,937 by 2025, which may result in an estimated 3.1 to 4.2 million households no longer able to qualify for a new car loan.⁴⁴ Similarly, many DOE appliance efficiency standards raise the purchase price to unaffordable levels for some low income buyers.⁴⁵ Increasingly stringent ozone standards have also affected the cost, efficacy, and availability of everyday consumer and

³⁴ <http://www.projectnoproject.com/>.

³⁵ <http://www.sciencedirect.com/science/article/pii/S0301421515001123>; see also, e.g., <http://www.americanactionforum.org/insight/on-jobs-and-regulation-in-graphs/>

³⁶ <https://www.gpo.gov/fdsys/pkg/FR-2015-10-23/pdf/2015-22842.pdf> (80 Fed. Reg. 64682 (Oct. 23, 2015)).

³⁷ <http://www.americaspower.org/wp-content/uploads/2015/10/Coal-Unit-Retirements.pdf>

³⁸ <https://www.gpo.gov/fdsys/pkg/CRPT-112hrpt225/pdf/CRPT-112hrpt225.pdf> at p. 5.

³⁹ <https://www.gpo.gov/fdsys/pkg/CRPT-112hrpt227/pdf/CRPT-112hrpt227.pdf> at p. 5.

⁴⁰ <https://www.gpo.gov/fdsys/pkg/CRPT-114hrpt439/pdf/CRPT-114hrpt439.pdf> at p. 3.

⁴¹ <http://www.congress.gov/114/crpt/hrpt171/CRPT-114hrpt171.pdf>, at p. 11.

⁴² NERA, <http://www.americaspower.org/wp-content/uploads/2015/11/NERA-CPP-Final-Nov-7.pdf>. See also <https://www.gpo.gov/fdsys/pkg/CRPT-114hrpt349/pdf/CRPT-114hrpt349.pdf>.

⁴³ http://www.nma.org/pdf/fact_sheets/elec-prices.pdf

⁴⁴ NADA, <http://www.nadafrontpage.com/upload/wysiwyg/The%20Effect%20of%20Proposed%20MY%202017-2025%20CAFE%20Standards%20on%20New-Vehicle%20Market.pdf>.

⁴⁵ Sofie Miller, George Washington Regulatory Studies Center, https://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/policy-perspectives_One-Discount-Rate-Fits-All.pdf.

commercial products, such as environmentally friendly paints and WD-40.⁴⁶ Some of the most affordable prescription medications for treating asthma and the only over-the-counter version are no longer available to lower-income asthma patients due to environmental regulations.⁴⁷

Taskforce Solutions: House Republicans will pursue legislation, such as the Regulatory Accountability Act of 2015, H.R. 185, introduced by Rep. Goodlatte, requiring a detailed and rigorous accounting of the direct and indirect costs of rules, including the impact on jobs and on low-income households. Regulations should be required to include an analysis of the impact on jobs, as well as the impacts on low-income households. We will also seek to make these provisions judicially reviewable.

Case Study: All Agencies Should Use Cost-Benefit Analysis

Independent financial regulators are not subject to numerous executive orders requiring rigorous cost-benefit analysis of major rulemakings.

Section 15(a) of the Commodity Exchange Act sets forth requirements for the Commodity Futures Trading Commission (CFTC) to consider the costs and benefits of the commission's actions. In its proposed rules, however, the CFTC identifies the limitations of Section 15(a) in requiring cost-benefit analysis, stating "[b]y its terms, Section 15(a) does not require the Commission to quantify the costs and benefits of an order to determine whether the benefits of the order outweigh its costs; rather, it requires that the Commission 'consider' the costs and benefits of its actions."

Consequently, the CFTC's Office of Inspector General (OIG) issued an investigative report in April of 2011 that examined the cost-benefit analysis performed by the Commission in connection with the Dodd-Frank Act rulemakings. In that report, the OIG stated, "[I]t is clear that the Commission staff viewed section 15(a) compliance to constitute a legal issue more than an economic one, and the views of the Office of General Counsel therefore trumped those expressed by the Office of the Chief Economist. . . . [W]e do not believe this approach enhanced the economic analysis performed."

On January 18, 2011, President Obama issued Executive Order No. 13563, which requires non-independent executive branch agencies to conduct cost-benefit analyses to ensure that both the quantitative and qualitative costs and benefits of proposed rulemakings are taken into account. The executive order also requires that regulations be accessible, consistent, written in plain language, and easy to understand. Because the CFTC is an independent agency, it was not required to abide by the order for any of its Dodd-Frank Act rulemakings.

The CFTC's development of new rules for the majority of the U.S. derivatives markets should reflect the best practices of federal rulemaking, such as rigorous cost-benefit analysis. Implementing Section 202 of H.R. 2289, the Commodity End-User Relief Act introduced by Rep. Conaway, would require the CFTC to perform a cost-benefit analysis, consistent with President Obama's Executive Order 13563, for any new rulemakings that have not yet been proposed.

Taskforce Solution: House Republicans support passage of Section 202 of H.R. 2289, which would require the CFTC to perform a cost-benefit analysis, consistent with President Obama's Executive Order 13563, for any new rulemakings that have not yet been proposed.

Take the Cumulative Impact of Rules into Account

Regulations are enacted one at a time, but it's the cumulative burden that matters most. After all, businesses and individuals can't pick and choose which federal requirements to comply with; they must meet them all. The cumulative burden is becoming more of a challenge over time, as new rules are added by the thousands per year while very few older ones get repealed. However, the analysis of most rules treats each in isolation, which misses out on the full effect.

The impacts of multiple rules are not merely additive. One regulatory requirement may conflict with another, making both more difficult to meet. For example, the Department of Energy has recently set strict new energy efficiency standards for many types of refrigerators and freezers, while at the same time the Environmental Protection Agency has banned some of

⁴⁶ Testimony of Stacy-Ann Turner, <http://docs.house.gov/meetings/IF/IF03/20150616/103610/HHRG-114-IF03-Wstate-TaylorS-20150616.pdf>; Testimony of Michael Freeman, <http://docs.house.gov/meetings/IF/IF03/20150616/103610/HHRG-114-IF03-Bio-FreemanM-20150616.pdf>.

⁴⁷ www.gpo.gov/fdsys/pkg/CRPT-112/hrpt673/pdf/CRPT-112/hrpt673.pdf at pp. 3-4; <http://www.ncbi.nlm.nih.gov/pubmed/25962128>.

the compounds that help boost energy efficiency in the same equipment.⁴⁸ Both agencies enacted their rules without serious regard for the actions of the other.

The cumulative regulatory burden can also strain compliance resources, especially for small businesses. For example, manufacturers have only a finite number of engineers to redesign their products to meet each new regulatory requirement, and can get overwhelmed when they have to meet numerous such requirements with overlapping deadlines. One small manufacturer of commercial refrigeration equipment testified that DOE and EPA's failure to consider the cumulative and conflicting effects of their regulations means that it may have to redesign its products every two or three years for 12 years in a row, a significant expense and challenge.⁴⁹

The cumulative effect can also create aggregate problems for which no individual rule can be held responsible. For example, the wave of regulations targeting coal-fired electricity has reached the point where the reliability of the electricity system is at increasing risk.⁵⁰ This is a growing threat, as a significant number of power plant shutdowns have already occurred and more are expected in the years ahead. Further, EPA has no experience addressing reliability, which is the proper province of the North American Electric Reliability Corporation (NERC) and the Federal Energy Regulatory Commission (FERC). But even if EPA were capable of considering reliability, the agency's specific analysis of each of its rules fails to capture the extent of the problem.

The Obama administration has acknowledged the need to look at the cumulative effects of rules. Executive Order 13563 requires agencies to consider cumulative regulatory burdens, and a March 20, 2012 Office of Information and Regulatory Affairs memorandum requires agencies to better coordinate the timing, content, and requirements of multiple rulemakings affecting a particular industry. In practice, however, the administration has shown little regard for the cumulative regulatory burden.

Task Force Solution: Legislation has been proposed requiring a formalized, multi-agency analysis of the cumulative impact of specific major rules on jobs, energy prices, electric reliability, and global competitiveness. The analysis would detail the cumulative impacts for consumers, small businesses, state and local governments, and labor markets, and it would prevent promulgation of rules that add significantly to the cumulative burden. Codification of the cumulative impacts language like that in Executive Order 13563 would also be helpful. House Republicans will pursue such legislation. In addition, provisions in H.R. 8, the North American Energy Security and Infrastructure Act of 2015 introduced by Rep. Upton, would require FERC to conduct an analysis of new rules likely to affect the reliability of the electricity system, and provisions in H.R. 185, the Regulatory Accountability Act of 2015, require consideration of cumulative regulatory impacts and codify features of the executive orders on rulemaking.⁵¹

Only Use Reproducible, Transparent Data Based on Sound Science

Congress must require that federal agencies follow basic principles of widely accepted scientific practice. This includes making data from taxpayer funded scientific studies publicly available and accessible. This data needs to be available to citizens, industries, and organizations interested in challenging its validity since it is often used to support federal rulemakings. The public should also have the opportunity to test whether scientific conclusions relying on such data can be independently verified—a method known as “reproducibility,” which scientists agree is essential to sound science. In many cases, regulations, including those that cost businesses and workers billions of dollars in compliance costs, rely on data from *taxpayer-funded* studies. Federal agencies at times keep those data secret or, in the case of federal grants to researchers, refuse to compel researchers to publicly release them. This is contrary to the fundamental scientific principles of openness and transparency, which taxpayers and regulated businesses expect and deserve. Secret science has been used to drive regulations that cripple innovation, job creation and economic competitiveness—all for benefits that are speculative and uncertain at best.

⁴⁸ <https://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/114/Letters/040115EPAHFCWhitfieldLetter.pdf>, p.2.

⁴⁹ Tangled in Red Tape: New Challenges for Small Manufacturers: Hearing Before the Comm. on Small Business, 114th. Cong. 9-10 (2015) (statement of Viktor Anderson, P.E., Director of Engineering, Structural Concepts, Muskegon, MI), available at <https://www.gpo.gov/fdsys/pkg/CHRG-114hhrg93732/pdf/CHRG-114hhrg93732.pdf>.

⁵⁰ NERC, <http://www.nerc.com/pa/RAPA/ra/Reliability%20Assessments%20DL/2015LTRA%20-%20Final%20Report.pdf>.

⁵¹ http://thomas.loc.gov/cgi-bin/cpquery/?&dbname=cpl14&sid=cpl14ds5Bg&refer=&r_n=hr347p1.114&item=&&&sel=TOC_69255&,

Case Study: Harvard ‘Six Cities’ Study

The House Science Committee has conducted extensive oversight of EPA’s scientific practices, including how it handles the basic scientific data supporting its regulations. The committee’s efforts have focused principally on EPA’s continued reliance on decades-old datasets from two major, taxpayer-funded studies: the Harvard “Six Cities” Study and American Cancer Society’s Cancer Prevention Study II, both of which serve as significant foundations for air-quality regulations (such as the Utility MACT rule and ozone standards) under the Clean Air Act.⁵² These studies examined the association between particulate matter and mortality.

Of particular concern is that a disproportionate share of overall federal regulatory benefit claims are based on these two studies. In 2012, the White House Office of Management and Budget noted that nearly all of EPA’s claimed benefits are attributable to the association between fine particulate matter and mortality. (OMB, among others, has acknowledged the “significant uncertainty” concerning this association.) Moreover, OMB revealed that benefits claimed for EPA’s rules made up between 60 and 81 percent of the benefits estimated for all federal regulations.⁵³

The Science Committee, along with other committees and independent experts, has questioned the validity of these studies, in part because their underlying data are not available to the public.⁵⁴ Over the course of several Congresses, the Science Committee has attempted to gain access to the data used in these studies. But the EPA, despite initial promises to work with the committee, has since refused to cooperate in securing public access to the data. In August 2013, the committee was forced to issue a subpoena to the EPA, which the agency still has not fully complied with.⁵⁵ Instead, the EPA criticized the committee, falsely claiming that releasing the datasets would potentially expose confidential health information. Yet the committee heard testimony from numerous witnesses who referenced existing protocols used by academic institutions and federal agencies that protect privacy.⁵⁶

Taxpayers have a right to know how science is being used to justify regulations, especially those that make them pay billions of dollars more for energy and other consumer goods. The Science Committee introduced the “Secret Science Reform Act” to improve the transparency of science used in federal regulations. The bill, sponsored by Science Committee Chairman Lamar Smith, prohibits the EPA administrator from proposing or finalizing regulations (and other “covered actions” such as guidance documents) unless, among other things, all “scientific and technical information” used to support them is “publicly available online in a manner that is sufficient for independent analysis and substantial reproduction of research results.”

⁵² Letter from Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Tech. & Hon. Chris Stewart, Chairman, Subcomm. on Env’t, to Hon. Gina McCarthy, Admin’r, U.S. Env’tl. Protection Agency, July 22, 2013 [hereinafter Smith Letter, 2013].

⁵³ Office of Management and Budget, Draft 2012 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities, March 2012 (https://www.whitehouse.gov/sites/default/files/omb/oira/draft_2012_cost_benefit_report.pdf)

⁵⁴ The “Shelby Amendment,” passed as part of the FY 1999 Omnibus Appropriations Act, required OMB to revise its rules “to require federal awarding agencies to ensure that all data produced under an award will be made available to the public through procedures established under the Freedom of Information Act (FOIA).” The result was a revision to OMB’s Circular A-110, which delineates the guidelines for such FOIA requests and also states that “the Federal Government has the right to obtain, reproduce, publish, or otherwise use the data first produced under an award [from the federal government].”

⁵⁵ Kelly Servick, House Panel Subpoenas EPA for Air Pollution Data, SCIENCE, Aug. 2, 2013, available at <http://www.sciencemag.org/news/2013/08/house-panel-subpoenas-epa-air-pollution-data> (last visited May 5, 2016).

Science, Space, & Technology Comm., Subcomm. on the Environment, 113th Cong., Feb. 11, 2014, available at <https://science.house.gov/legislation/hearings/environment-subcommittee-hearing-ensuring-open-science-epa>.

Case Study: Sage Grouse

The Endangered Species Act (ESA) requires federal regulators to base their decisions on the best available scientific and commercial data. Federal agencies however, refuse to release the data used for the listing decisions, and third-party reviewers, such as scientists, often need a court order to force agencies to offer their data publicly.

The 2010 decision by the U.S. Fish and Wildlife Service (FWS) that the Greater Sage Grouse warrants ESA listing is based primarily on a 2009 taxpayer-funded FWS study. This study was cited 62 times in the FWS's listing decision. Yet, the data used in the study still has not been made publicly available. Requests from both local governments and the scientific community have been refused.⁵⁷ Counties that questioned the accuracy of a map developed for sage grouse habitat in Colorado have been refused by the FWS in their requests to verify data used by the FWS in its National Technical Team Report.⁵⁸ In more than one case, a court order has been required to obtain the data from federal officials, even though the data was obtained through taxpayer-funded studies.⁵⁹

In February 2015, the House Oversight and Government Reform Committee requested the data that the Department of Interior collected to determine whether to list certain species as endangered or threatened under the ESA. To date, the committee has not received it. In April 2016, FWS Director Dan Ashe testified before the House Oversight and Government Reform Subcommittee on the Interior about data transparency. Though the Director said all of the science used in making decisions is made available to the public, he did outline situations in which raw data cannot be made available.

Ninety percent of Americans agree that studies and data used to make federal government decisions should be public, according to a 2015 poll from the Institute of Energy Research. In 2012, the President's science advisor testified that "absolutely, the data on which regulatory decisions . . . are based should be made available to the [Science] Committee and should be made public." The chair of the EPA's Science Advisory Board testified that EPA's advisors recommend "that literature and data used by the EPA be peer-reviewed and made available to the public."

Taskforce Solution: When Congress passes legislation with the intent to benefit the environment or public health, we should ensure that any regulations executing the statute be based on publically available, reproducible, and sound science.⁶⁰ During the 114th Congress, the House Republicans ensured passage of H.R. 1030, the Secret Science Reform Act of 2015 introduced by Rep. Lamar Smith, H.R. 1029, the EPA Science Advisory Board Reform Act of 2015 introduced by Rep. Lucas, and H.R. 185, the Regulatory Accountability Act of 2015 introduced by Rep. Goodlatte, to advance transparency and reproducibility—the basic tenets of science.⁶¹ Costly federal regulations should only be based upon data that is available to independent scientists and the public. Republicans will continue to pursue these solutions..

Other tools recommended by House Republicans to bolster transparency and oversight include a user-friendly dashboard or enhanced version of RegInfo.gov, which would promote transparency; allow interested parties, such as small businesses, to more easily track regulatory activities; and promote the public interest. The dashboard could include access to supporting evidence and scientific data by federal agencies proposing the rulemaking as well as allow a point of contact or link to provide input on the data.

⁵⁷ Transparency and Sound Science Gone Extinct?: The Impacts of the Obama Administration's Closed-Door Settlements on Endangered Species and People: Oversight Hearing Before the H. Comm. On Natural Resources, 113th Cong. 27 (2013) (testimony of Dr. Rob Roy Ramey), available at <http://www.gpo.gov/fdsys/pkg/CHRG-113hhrg82446/pdf/CHRG-113hhrg82446.pdf>.

⁵⁸ Defining Species Conservation Success: Tribal, State and Local Stewardship vs. Federal Courtroom Battles and Sue-and-Settle Practices: Oversight Hearing Before the H. Comm. On Natural Resources, 113th Cong. 39 (2013) (written testimony of Tom Jankovsky, Garfield County, Colorado); available at <http://www.gpo.gov/fdsys/pkg/CHRG-113hhrg81318/pdf/CHRG-113hhrg81318.pdf>.

⁵⁹ Transparency and Sound Science Gone Extinct?: The Impacts of the Obama Administration's Closed-Door Settlements on Endangered Species and People: Oversight Hearing Before the H. Comm. On Natural Resources, 113th Cong. 27 (2013) (testimony of Dr. Rob Roy Ramey), available at <http://www.gpo.gov/fdsys/pkg/CHRG-113hhrg82446/pdf/CHRG-113hhrg82446.pdf>.

⁶⁰ H.R. REP. NO. 114-34, at 2-4 (2015) available at <https://www.congress.gov/114/crpt/hrpt34/CRPT-114hrpt34.pdf> (last visited Apr. 25, 2015) [hereinafter H.R. Rep. No. 114-34].

⁶¹ H. Comm. on Science, Space, & Tech. Committee website, <https://science.house.gov/legislation/markups/full-committee-markup-hr-1030-secret-science-reform-act-2015-hr-1029-epa-science> (last visited Apr. 25, 2015).

Allow Adequate Public Comment Periods for Complex Rules or Shift to Formal Rulemakings.

Another major drawback in the federal regulatory system is that agencies often are able to impose new regulations without sufficient opportunity for public input. Agencies may conduct closed-door meetings to hear from select interests. Agencies may provide public-comment periods on their proposals, most frequently of 30- or 60-days length. But when it comes to new major regulations intended to tackle complex problems and impose high levels of direct and indirect costs, 30 or 60 days is not enough for public comment to be meaningful. In addition, there are instances where different agencies promulgate complex rulemakings on converging issues, such as methane emissions rulemakings by the Department of the Interior and the EPA, but do not provide enough time for the regulated community to thoroughly investigate how these requirements will overlap and affect entire field operations.

For example, the Department of Labor recently finalized a rule that will revise its standards implementing the exemption from minimum wage and overtime pay for executive, administrative, professional, outside sales, or computer employees by increasing the salary threshold by 100 percent. Although the overtime rule will affect a large number of employers—including small businesses, non-profits, universities, and local governments—and may cause significant disruptions in the workplaces that are likely to harm employers and their employees, the DOL provided only a 60-day comment period when it proposed the rule.⁶²

The DOL provided an even shorter comment period for its recently proposed rule that will require over 500,000 federal contractors and businesses that operate on federal property and federal lands, such as outdoor recreation companies, to provide paid sick leave.⁶³ Originally, the DOL provided only a 33-day comment period. It extended the comment period by 15 days after concerns were raised that the original comment period was insufficient and a 30-day extension was requested by the Small Business Administration Office of Advocacy.⁶⁴

In addition, agencies almost never engage in formal rulemaking hearings that expose their rulemaking evidence to cross-examination. In the rush towards finalization, agencies have promulgated poorly worded regulations that in some cases have undermined the rule's entire premise.⁶⁵ In order to prevent such unintended consequences, an effective and transparent regulatory system should incorporate feedback from technical experts early on in the rulemaking process, allow for growth in innovative technological practices, and provide clear, evidentiary support to show the measurable impacts regulatory changes will have to ensure a safe operating environment. Early collaboration with technical experts goes hand-in-hand with providing enough time for the regulated community to provide feedback on complex rulemakings.

For example, agencies at the Department of the Interior spent years behind closed-doors putting together significant and complex rulemakings and yet provided the regulated community only 60 days to fully analyze and offer comments. In some cases—such as the Well-Control rule; the Venting and Flaring rule; and Onshore Orders 3, 4, and 5—many public comments pointed out inadequate comment periods, technical flaws in the rulemaking, and areas where multiple rulemakings are likely to create conflicting and duplicative requirements. In most of these cases the regulated community offered alternative technical language from engineers in the field – demonstrating innovative, private-sector approaches to achieve federal goals without compromising safe operations or causing massive layoffs from shutting-in production. In each of these instances, most of the serious problems in the proposed regulations could have easily been avoided had agencies worked together under a formal rulemaking process.

Task Force Solution: House Republicans will seek to enact cross-cutting reforms such as those in the Regulatory Accountability Act of 2015, to require additional time for public comment on proposed new major regulations and hearings with cross-examination on core issues in contested new billion-dollar rulemakings. We also will pursue the enactment of

⁶² Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 80 Fed. Reg. 38,516 (July 6, 2015).

⁶³ Establishing Paid Sick Leave for Federal Contractors; Proposed Rules, 81 Fed. Reg. 9,592 (Feb. 25, 2016).

⁶⁴ Letter from the Hon. Darryl L. DePriest, Chief Counsel for Advocacy, SBA, to the Hon. Thomas E. Perez, Secretary, DOL (Mar. 1, 2016), available at https://www.sba.gov/sites/default/files/Advocacy_Final_Comment_Letter_Paid_Sick_Leave_Extension.pdf.

⁶⁵ On April 13, 2015, the Bureau of Safety and Environmental Enforcement announced their "well control rule" – the focus of which was on updating existing offshore regulations related to blowout preventer systems. The rule also included highly technical language related to specific drilling margins used in deepwater applications which many offshore operators pointed out during the short 60-day public comment period would: "...decrease safety while at the same time undermining the ability to develop a critical national resource" (Chevron), "introduce new risk" (Statoil), and "...have an opposite effect than intended and would ultimately prove detrimental to both safety and the environment." (Exxon Mobil)

more rigorous agency-specific requirements for those agencies whose records demonstrate that more time is required for public comment and more opportunity is needed for cross-examination of agency evidence.

Require Meaningful Judicial Review of Rules

Federal regulatory agencies know that, without court intervention, they can impose their will before the judicial system has a chance to weigh in. This is because regulations frequently necessitate the initiation of costly compliance steps before a final decision from a federal court is handed down. As a result, even regulations that are ultimately found to be contrary to law can have an adverse impact on jobs and the economy.

For example, the EPA enacted stringent regulations in 2015 affecting the brick industry, and they are currently being challenged in court. These regulations impose very demanding requirements, especially for a small industry dominated by small businesses⁶⁶ that suffered significant sales and job losses during the recession. Most brick makers will have to undertake expensive compliance measures (or decide to close) before judicial review will be complete. The brick industry has been placed in this predicament once before. The last round of EPA brick regulations were enacted in 2003 and required compliance by 2006. The rules were rejected by a federal court in 2007—too late to help the brick makers who had already been forced to undertake costly and irreversible compliance steps. In order to prevent a recurrence, the House passed H.R. 4557, the Blocking Regulatory Interference from Closing Kilns (BRICK) Act introduced by Rep. Bill Johnson, which would extend the compliance deadlines with the latest regulations until after judicial review is complete.⁶⁷

This problem is likewise illustrated by the case of *Michigan v. EPA*. The EPA rule applied to electric utilities, imposing an estimated \$9.6 billion in annual costs to achieve only \$4-6 million in benefits. The Supreme Court ultimately found the rule unlawful, but even then did not set it aside nor did the courts ever delay the rule pending review. As a result, after years of litigation, it may well be the case that over \$50 billion will be spent on compliance with a rule that ultimately is discarded. In a blog post, the EPA admitted that the Supreme Court decision is of limited consequence, since the rule's requirements had already forced many power plants to undertake compliance steps.⁶⁸

Taskforce Solution: To eliminate the possibility of this waste and abuse, House Republicans will seek to enact reforms, such as H.R. 3438, the REVIEW Act of 2015 introduced by Rep. Marino, to prevent high-cost regulations from taking effect during the pendency of litigation. Congress also will work to identify agency-specific reforms for less economically significant regulations for which the potential damage warrants meaningful judicial review.

Reduce Paperwork

Federal paperwork can be daunting, and minor mistakes can result in major fines. The Paperwork Reduction Act (PRA) was originally passed in 1980 to minimize the burden on individuals, small businesses, and others. It was later revised in 1986 and 1995. In 2002, the Small Business Paperwork Relief Act was enacted with the goal of reducing the federal paperwork burden on small businesses. While streamlining and eliminating outdated, redundant, and excessive paperwork and regulatory burdens has been a priority for a long time, the paperwork burden continues to grow, the accuracy of federal paperwork estimates has been questioned, and the PRA has not been updated to account for new technologies.

According to the federal government's Information Collection Budget for 2014, the public spent 9.45 billion hours on federal paperwork in fiscal year 2013,⁶⁹ which is equivalent to 4.725 million people working full time for a year.⁷⁰ While the Department of the Treasury accounted for about 75 percent of the total, the American public spent a significant amount of time on non-Treasury paperwork—2.446 billion hours—an increase of 62.1 percent since fiscal year 2003.⁷¹ Beyond the number of hours Americans spend on paperwork, the sheer volume of forms is also concerning.

⁶⁶ According to the EPA, 36 of 44 affected brick companies, or 82 percent, are small businesses. NESHAP for Brick and Structural Clay Products Manufacturing; and NESHAP for Clay Ceramics Manufacturing; Final Rule, 80 Fed. Reg. 65,470, 65,518 (Oct. 26, 2015).

⁶⁷ <https://www.gpo.gov/fdsys/pkg/CRPT-114/hrpt439/pdf/CRPT-114/hrpt439.pdf>.

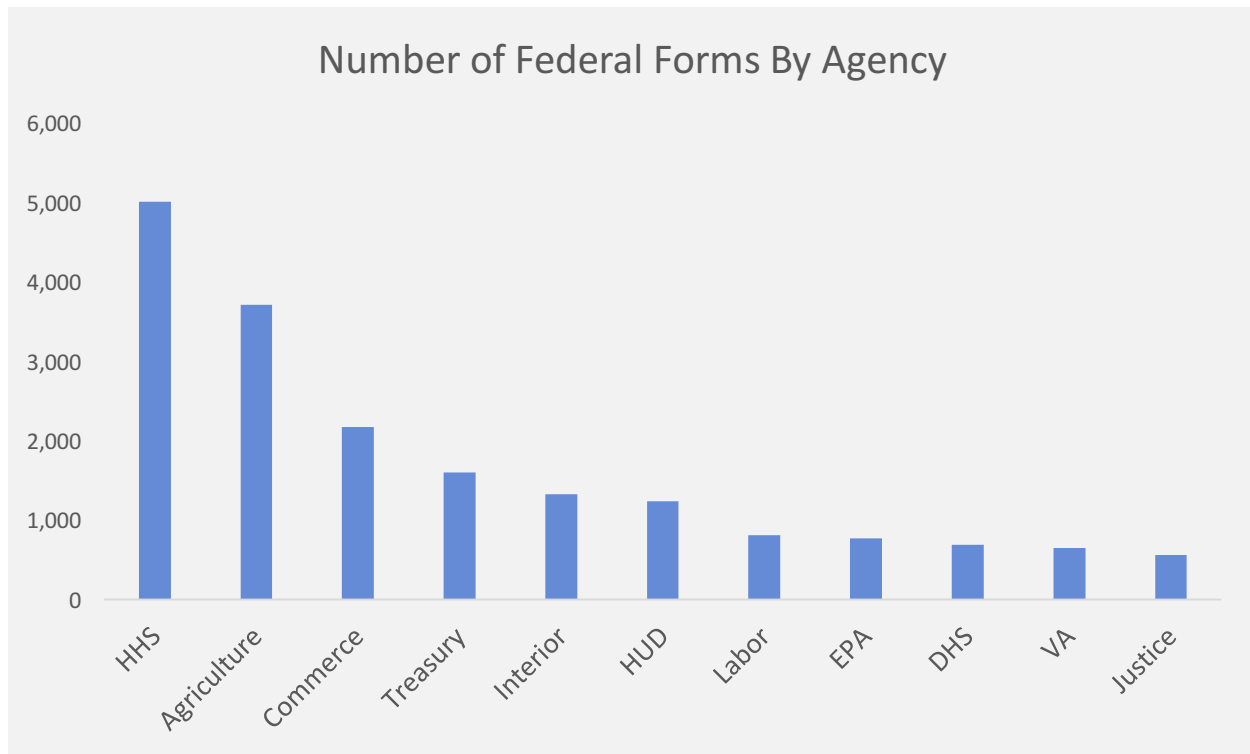
⁶⁸ <https://blog.epa.gov/blog/2015/06/in-perspective-the-supreme-courts-mercury-and-air-toxics-rule-decision/>

⁶⁹ Office of Management and Budget, Office of Information and Regulatory Affairs, Information Collection Budget ii-iii (2014), available at https://www.whitehouse.gov/sites/default/files/omb/infoeg/icb/icb_2014.pdf.

⁷⁰ Calculated by dividing 9.45 billion hours by 2,000 hours, which is the total number of hours an individual working 40 hours a week for 50 weeks a year would work.

⁷¹ See Regulation: The Hidden Small Business Tax: Hearing Before the H. Comm. On Small Business, 114th Cong. (2016) (statement of Rosario Palmieri, Vice President, Labor, Legal and Regulatory Policy, National Association of Manufacturers), available at <http://smallbusiness.house.gov/calendar/eventsingle.aspx?EventID=399006>.

The Office of Management and Budget's Office of Information and Regulatory Affairs is overdue in releasing last year's annual Information Collection Budget. However, its website, reginfo.gov, shows that the total number of hours the public currently spends responding to federal paperwork requests has ballooned to 11.41 billion hours.⁷² As of April 2016, there were more than 23,000 approved forms to which federal agencies request or require individuals and businesses to respond.⁷³ The Department of Health and Human Services leads the pack with over 5,000 forms, followed by the Department of Agriculture, approximately 3,700 forms, and the Department of Commerce, over 2,100 forms.



Source: Sam Batkins, American Action Forum, How Many Federal Forms Are There? (Apr. 21, 2016), available at <http://www.americanactionforum.org/print?url=http://www.americanactionforum.org/insight/many-federal-forms/>

There are instances of agencies seeking to reduce the reporting burden on Americans, but those cases are few and far between. For example, the Risk Management Agency and the Farm Service Agency at the U.S. Department of Agriculture are working together in an attempt to reduce the reporting burden on agricultural producers submitting data to USDA through an automated reporting process called Acreage and Crop Reporting Streamlining Initiative (ACRSI). Instead of reporting the same information multiple times in differing formats, farmers and ranchers would report certain information in a standard manner through a single reporting point. If this pilot program proves successful, ACRSI will reduce the reporting burden and cost on farmers and ranchers. It will also increase the accuracy of USDA's data and reduce the cost to USDA of acquiring data. This program is a step in the right direction, but is currently only a pilot project that applies to only two agencies of USDA and the results are, as yet, uncertain. Many more efforts like these are needed in many other federal agencies.

The paperwork burden poses significant challenges for small businesses that have less staff and fewer resources to keep up with federal forms. For example, a small manufacturer recently testified that in addition to Department of the Treasury forms, it files federal forms to ship products overseas and must respond to Department of Commerce surveys. That same manufacturer testified that inadvertently omitting a third signature from a 20-page form initially resulted in a \$15,000 penalty.

⁷² As of May 5, 2016, the government-wide total annual hours was 11,409,739,669.5. <http://www.reginfo.gov/public/do/PRAReport?operation=11>.

⁷³ Sam Batkins, American Action Forum, How Many Federal Forms are There? (Apr. 21, 2016), available at <http://www.americanactionforum.org/print?url=http://www.americanactionforum.org/insight/many-federal-forms/>.

from the Department of the Treasury. Although the fine was later reduced, the company had to devote valuable resources to fixing the signature error.⁷⁴

While the extent of the burden is significant, a recent report commissioned by the Administrative Conference of the United States described the PRA-mandated burden estimates as “highly questionable at best and random numbers at worst.”⁷⁵ The numbers could be higher or lower for various information collections but is unknown. In addition, past efforts to harmonize and streamline data collection in order to reduce burdens on small businesses seem to have fallen short. Information is needed by federal agencies to carry out their statutory duties and provide services to the American public, but outdated, redundant, and unnecessary paperwork requirements should be eliminated and excessive fines reduced.

Task Force Solution: The Committee on Small Business and the Committee on Oversight and Government Reform should conduct oversight to determine whether the PRA is working as intended or if legislative changes are needed to modernize the statute. In an effort to better understand the paperwork burden that is being imposed on businesses, the Information Collection Budget and reginfo.gov should be examined to determine if it is providing useful information on the paperwork burden, and websites such as business.usa.gov and forms.gov should be assessed to determine if they are actually making it easier for small businesses to access needed information.

House Republicans will pursue legislation to waive penalties for first-time, non-harmful paperwork violations by small businesses. Additionally, the feasibility of having a single website where a small business could enter its number of employees and industry code to easily find all the forms it is required to file should be examined. This may require the Office of Information and Regulatory Affairs at the Office of Management and Budget to identify each form that a business must file by the 6-digit North American Industrial Classification code. Such an inventory could also make it easier to identify duplicative and overlapping paperwork that should be eliminated. House Republicans will also pursue legislation repealing unnecessary paperwork requirements as well as legislation giving agencies more power to do the same.

Don't Get in the Way of Technological Innovation

Federal regulations are inherently backward-looking. Regulatory programs are designed around the state of the technology when the programs were created, and as a result they can stand in the way of technological advances. Existing regulations may not be suitable to new technologies, and risk-averse regulators tend to raise the bar when it comes to approving anything that is less well known. The end result can be that technological innovation—which has always been one of America's strengths—gets slowed down or even stopped by Washington.

For example, it took the Federal Aviation Administration (FAA) nearly three years to certify a new, state-of-the-art business aircraft for an American aerospace manufacturer. This delay allowed foreign manufacturers—whose civil aviation authorities have more streamlined certification processes than the FAA—to gain a competitive advantage in the global aircraft market.

The Nuclear Regulatory Commission (NRC) is another example of an agency that, inadvertently or not, discourages state-of-the-art technology. NRC's regulatory approval process is geared toward decades-old reactor designs rather than advanced reactors, and NRC staff are less familiar with the new technologies. This creates uncertainty for innovators and discourages investment in new designs.

⁷⁴ See Examining Federal Rulemaking Challenges and Areas of Improvement within the Existing Regulatory Process: Hearing Before the Subcomm. on Regulatory Affairs and Federal Management of the S. Comm. on Homeland Security and Governmental Affairs, 114th Cong. 65 (statement of Drew Greenblatt, President and Owner, Marlin Steel Wire Products, LLC), available at <https://www.gpo.gov/fdsys/pkg/CHRG-114shrg94900/pdf/CHRG-114shrg94900.pdf>.

⁷⁵ Stuart Shapiro, Administrative Conference of the United States, The Paperwork Reduction Act: Research on Current Practices and Recommendations for Reform 21 (2012), available at <https://www.acus.gov/sites/default/files/documents/Revised-PRA-Report-2-9-12.pdf>.

Case Study: Electricity Markets

Congress has jurisdiction over the wholesale sale and transmission of electricity and the markets that serve the electric needs of over two thirds of the nation. Overseen by the Federal Energy Regulatory Commission or in Texas by the Public Utilities Commission—these markets are coordinated and directed by independent system operators (ISOs) and regional transmission organizations (RTOs), whose goal is to direct overall access and operation of the regional electric transmission grid in its area. These markets—particularly the organized wholesale markets and the rules that govern them—were created over the course of the last two decades amid many regulatory, technology, and consumer behavioral changes in the electricity sector. The processes and rules that govern these markets have had to coincide with continued policy interventions such as state renewable portfolio standards, tax subsidies, mandates, EPA's proposed Clean Power Plan, and other mechanisms which over time have created challenges to the market-based functioning of the system. In addition, the availability of new distributed energy resources and advanced, consumer-facing technologies in the electricity space are offering consumers the potential to make smarter energy-use decisions and providing the electricity sector with new ways to generate and distribute power, while at the same time creating further challenges to the current market rules and governance procedures. As a result, these markets continue to underachieve. The changes are driving consideration of new business and regulatory models within the electricity sector – particularly at the state level – to better reflect the changing market and policy conditions. Despite continued best efforts by the Commission and among the ISOs and RTOs to address these issues and adapt to changing market and regulatory conditions, the restructured wholesale markets have, in many ways, become mere administrative constructs that are continuously “tweaked” through the regulatory process. Regulations and policies outside of the electricity markets are also constraining the ability of these markets to evolve and incorporate new technologies to better serve businesses and consumers.

Task Force Solution: HR 8, the North American Energy Security and Infrastructure Act, included language that attempted to address some of the pending issues in the electricity markets by seeking updated reviews of whether and how the market rules, practices, and structures of regional transmission organizations produce rates that are just and reasonable. It also required RTOs and ISOs that operate a capacity market to provide to FERC an analysis of how such markets utilize competitive market forces in procuring capacity resources, and whether such resources have certain neutral performance criteria that value certain reliability attributes.

Congress has also passed H.J. Res 71 and 72 disapproving of EPA's Clean Power Plan for new and existing power plants, in order to prevent EPA from imposing additional constraints on the electricity markets and system that is currently overseen by the FERC, RTOs, ISOs and State Public Utility Commissions. In order to ensure that consumer affordability, reliability, security, and innovation are all properly valued in existing markets, additional congressional oversight and reform efforts will likely be needed to evaluate and address some of the broader competitive market design, policy, technology and jurisdictional issues of the electricity markets, as well as reforms to federal environmental and tax policies that impact those markets.

H.R. 4979, the Advanced Nuclear Technology Development Act of 2016 introduced by Rep. Latta, is an example of an agency-specific reform. It requires the NRC to develop a new regulatory framework focused on current nuclear technologies, and also creates programs to strengthen staff expertise on advanced reactors.

Case Study: Unleashing Innovative New Financial Services and Technology

By fostering innovation and new technology, our approach will make it easier for entrepreneurs to access start-up capital so they can launch new businesses and hire workers.

For instance, in order to open up capital investment in America's new and small businesses, Congress must focus on the areas where capital is the most dynamic: angel investing, investment crowdfunding, and financial technology, otherwise known as FinTech.

For angel investing, we must update our securities laws so that early-stage investors can more efficiently invest in America's startups. That means raising the cap on the number of investors that can invest in early-stage, qualifying venture funds. Currently the federal securities laws limit the number of investors in angel funds to 100 investors, creating an arbitrary and harmful ceiling on the amount of money that can go to startups.

H.R. 4854, Supporting America's Innovators Act of 2016, sponsored by Rep. Patrick McHenry, increases the investor limitation to 500 for qualifying venture capital funds, thereby expanding the ability of companies to raise financing.

H.R. 4498, the Helping Angels Lead Our Startups (HALOS) Act, sponsored by Rep. Steve Chabot, will help startup companies more easily attract investments. The bill defines an "angel investor group" and clarifies a regulation issued by the SEC about when a business can make a presentation to interested parties without running afoul of the securities laws. Doing so will help smaller companies gain access to the broadest and deepest pool of potential investors.

As for investment crowdfunding, late last year the SEC released its final rule to provide small businesses the legal authority needed to raise capital on crowdfunding portals. Unfortunately, it contains provisions so unworkable that crowdfunding risks dying on the vine. In particular, it fails to update some of the most basic securities laws to meet the demands of crowdfunding. H.R. 4855, the "Fix Crowdfunding Act," from Rep. McHenry, refines and clarifies the most unworkable parts of Title III to facilitate the growth of small business investment on crowdfunding portals.

Finally, online marketplace and small business lending have created a new era of innovation and technology in financial services. These companies often partner with banks to use data in smarter, more nuanced ways so that small businesses and consumers get much needed financing. Unfortunately, FinTech companies face regulations that are often fragmented and burdensome. Additionally, FinTech is under increased scrutiny by the financial regulators.

Taskforce Solution: In addition to H.R. 4854, H.R. 4855 and H.R. 4498, House Republicans will be introducing legislation in the coming weeks and months that address some of the burdensome regulations in the FinTech space and promote financial innovation and financial inclusion so that more capital is being invested in consumers and small businesses.

A More Aggressive Role for Congress in the Regulatory Process

Whether it is revising underlying statutes or existing and new regulations, Congress needs to do a better job of reclaiming its oversight role over the agencies. A deep discussion of these issues and policies are included in *The Better Way by Restoring Constitutional Authority*. Some of the most important policies as they relate to reducing the regulatory burden are highlighted below.

Revisit or Revise Underlying Statutes

Congress granted federal agencies regulatory authority decades ago, and many of these laws have not been amended since. Some of these regulatory programs continue to work well, but others call out for revision. Congress should periodically update these laws to address problems that have emerged with the resulting regulations.

Case Study: Modernizing the Clean Water Act

When Congress wrote the Clean Water Act and most of the other federal environmental statutes four decades ago, it thought the federal government and the states would be equal partners in addressing environmental issues. For many years that regulatory scheme has worked well. Today, our environment is much cleaner. But over time, the federal government's regulatory approach has shifted from a partnership toward a more top-down, command-and-control style.⁷⁶ This is undermining the substantial progress our nation has made in environmental protection, much of which came from voluntary conservation. This shift, plus a need for more flexible approaches, is getting in the way of resolving these challenges.

While most of the point sources discharging pollutants into water have been cleaned up, our nation still has “legacy” issues that need to be addressed. These involve extremely costly upgrades and improvements to aged water and wastewater infrastructure in many of our cities, towns, and rural communities, and past contamination of the ground and water largely stemming from waste disposal practices that predated environmental laws. America also needs to continue addressing issues involving diffuse nonpoint sources of runoff.

Because a large portion of these regulatory mandates are going unfunded by the federal regulators imposing them, the regulated community is becoming increasingly overwhelmed. Many of the mandates being imposed on individuals and communities reflect a “one-size-fits-all” approach that does not account for specific public health and other needs, and often require massive capital investments implemented on tight schedules. Conversely, voluntary incentive-based conservation has yielded great strides in protecting our natural resources.

Task Force Solution: It is time for the national clean water strategy to evolve from a “one-size-fits-all” approach, to a more flexible and collaborative strategy. The federal government needs to incentivize states through a “bottom-up” approach that gives them a meaningful role in coming up with appropriate solutions. The approaches selected to address the issues must be technologically and economically feasible, effective, reasonable, and scientifically sound, in order to ensure support for them.

Review of Existing Regulations

Since 1993, 94,246 federal regulations have been enacted, and nearly all remain on the books.⁷⁷ The agencies themselves have shown little interest in revisiting their past regulations and thinning out those that have proven to be ineffective, outdated, or unnecessarily expensive. For this reason, there is need for an independent body to subject existing regulations to periodic review.

The Searching for and Cutting Regulations That Are Unnecessarily Burdensome (SCRUB) Act of 2015 would have created an independent commission to identify rules for repeal. The process, similar in some respects to the Base Realignment and Closure (BRAC) process that succeeded in closing down obsolete military installations, would objectively review existing regulations for repeal. Its recommendations would then be presented to Congress for approval. The concept of an independent commission to assess regulations deserves to be considered again.

Affirmative Approval or Disapproval of New Regulations

It has become common for new federal regulations to stray beyond congressional intent. Indeed, a number of this administration's regulations, such as those addressing global warming, are attempts to do through regulation what Congress expressly rejected as legislation. But it is Congress, not unelected bureaucrats, that represents the will of the people.

⁷⁶ In the case of the Clean Water Act, this more expansive regulatory approach involves mandates that often include enforcement actions, with penalties attached; states and local governments being zealously pressed to adopt a new “framework” for managing nutrients pollution, including strict numerical nutrient water quality standards, tough total maximum daily load (TMDL) reduction goals, and stringent nutrient effluent limits for many municipal and industrial dischargers; permit conditions, often driven by stringent TMDLs, requiring the control of stormwater discharges and the installation of extremely expensive advanced waste treatment to remove the next increment of pollutants; and attempts to expand the scope of Federal jurisdiction under the Clean Water Act to indirectly regulate land use and nonpoint sources by claiming regulatory authority over all waters and wet areas on land.

⁷⁷ Crews, *Ten Thousand Commandments* 2016, Figure 13.

One way to better align regulatory action with congressional intent and restore accountability is to require congressional approval of new major regulations. H.R. 427, the Regulations from the Executive In Need of Scrutiny (REINS) Act introduced by Rep. Todd Young, would require such approval for regulations estimated to have an impact of \$100 million dollars or more. The end result would be regulations more in line with the true public interest. This or similar bills should be given serious consideration.

In other instances, Congress may need to provide further direction to ensure an agency rule confirms to congressional intent. The following case study on WOTUS provides a good example.

Case Study: The Regulating Waters of the United States (WOTUS) Rule: Trampling on a Successful Federal-State Partnership

One of our most important federal-state regulatory partnership was established under the Clean Water Act. The EPA and the U.S. Army Corps of Engineers are the co-regulators that carry out the federal government's responsibilities under this partnership. Everything else remains with the states.

The extent of the Federal government's authority under the CWA was limited to "navigable waters," which under the CWA are defined as "waters of the United States" (WOTUS). Twice, the Supreme Court has reaffirmed the federal-state partnership under the CWA, when it told the federal agencies that there are limits to federal jurisdiction under the CWA, and that they had gone too far in asserting their authority.

Despite this, the administration has subsequently sought to bypass the legislative process and achieve an expansionist, federally dictated agenda for all waters through agency guidance and the executive branch's regulatory process.

In April 2014, the EPA and the Corps put forward a proposed rule entitled "Definition of 'Waters of the United States' Under the Clean Water Act," which the agencies claimed would "clarify" federal jurisdiction. The agencies promulgated the final rule in June 2015.⁷⁸

The rule misconstrues the two relevant Supreme Court cases, using them as a justification to broaden its authority over all waters. The rule goes far beyond merely clarifying the scope of waters subject to CWA programs. Rather, it increases the scope. There are also substantial flaws in the economic and scientific assumptions upon which the rule is based.

Further, the timing of the agencies' actions undermines the credibility of the rule and the process to develop it, as well as the federal-state partnership in regulating waters.⁷⁹

This could significantly restrict the ability of landowners to make decisions about their property and the rights of state and local governments to plan for their own development.

Task Force Solution: The EPA and the Corps need to withdraw the current rule that defines "waters of the United States" under the CWA and develop a new proposal that is consistent with the law, Supreme Court rulings, the feedback from the public comments, and recommendations from state and local officials and other stakeholders.⁸⁰

In both the 113th and 114th Congresses, the House of Representatives passed legislation⁸¹ that would require the EPA and the Corps to do just that.

⁷⁸ The final rule has been challenged in multiple courts by numerous stakeholders and over 30 states. On October 9, 2015, the U.S. Court of Appeals for the Sixth Circuit (Case Nos. 15-3799/3822/3853/3887) issued a nationwide stay of the final rule. Previously, on August 27, 2015, the U.S. District Court of North Dakota (Civil Case No. 3:15-cv-59) had stayed the rule in thirteen states.

⁷⁹ The agencies developed the proposal without first properly consulting state and local authorities; without considering their rights, their responsibilities, their liabilities, and their budgets; and without realistically examining the potential economic and legal impacts on private citizens, farmers, and other stakeholders. Many states and local governments have objected to this rule and the erosion of their authority and the Federal-state partnership.

⁸⁰ The new rulemaking process needs to include holding a federalism consultation with the states and local governments, and consulting with and soliciting recommendations from stakeholders that represent a broad range of perspectives who could be impacted either directly or indirectly by the new rule. The agencies must promote transparency in this process by making all of the communications, records, and documents related to the process available to the public, and preparing a report that responds to the comments received and provides a detailed explanation of how the agencies have used the comments and stakeholder processes in the new rule.

A Regulatory Approach That Enhances America's Energy Abundance

Current Regulations Impede Domestic Energy Production and Use

America is blessed with an abundance of energy reserves, and in fact has more fossil fuels (coal, oil, natural gas) than any other nation.⁸² Along with nuclear, hydroelectric, and renewable sources, America has the potential to have a plentiful, affordable, reliable, and diverse energy supply for many decades to come. Long-held beliefs that America was running out of oil and natural gas and perhaps other sources—leading to a host of laws and regulations based on assumptions of scarcity—have given way to a reality of rising and sustainable domestic production.⁸³ American advances in energy production, such as horizontal drilling and hydraulic fracturing, are the reason for the dramatic turnaround.

Fears about OPEC or other outside forces depriving the U.S. of needed energy supplies have subsided considerably. America is now an energy superpower and firmly controls its own energy destiny. The only thing standing between the nation's abundant domestic energy and the consumers and businesses that need it is a long list of federal regulations. OPEC may not be as much of a problem anymore, but Washington still is.

The stakes could not be any higher. The energy boom has been far and away the best job creator of the last decade, and is estimated to be responsible for well over 1 million direct and indirect jobs.⁸⁴ This includes energy production jobs as well as those associated with expanding the system of pipelines, electric transmission lines and other elements of the nation's energy infrastructure.⁸⁵ While the current low energy price environment has led to job losses in the sector, the long-term potential is still very promising.

Affordable energy also makes possible other job opportunities, such as energy-intensive manufacturing.⁸⁶ Oil and natural gas exports, something considered unthinkable to those who believed rising imports to be inevitable, are now a reality and a source of yet more jobs throughout the country.⁸⁷ And, perhaps most importantly, affordable energy benefits consumers and businesses generally, especially low-income households and struggling small businesses that can least afford high energy bills.

However, these benefits are jeopardized by federal regulations that discourage energy production and use. The extreme view that America should “keep it in the ground” is finding voice through these regulations. According to one estimate, the energy boom could support an additional 2.3 million jobs by 2035, but regulatory constraints could reduce that figure substantially.⁸⁸ Other energy sources also face constraints.

The Regulatory Hurdles

America's energy renaissance has necessitated an infrastructure renaissance to deliver this energy to end users, but these job-creating projects face a gauntlet of federal reviews. Particularly troubling is the fact that federal permitting authorities are usually under no deadlines to act and can drag out the approval process for many years. Most notably, the Keystone XL pipeline project, which would have provided additional Canadian oil to Midwestern and Gulf refineries, was under review by the Obama administration for over six years before finally being rejected. The administration's own analysis admitted the benefits of this project, including 42,000 jobs, strengthening of North American energy security, and safety and environmental benefits from supplanting more hazardous modes of oil transport.⁸⁹ Nonetheless, it was rejected. The number of energy and energy-related projects being delayed numbers well into the hundreds, and by some estimates are holding back in excess of

⁸¹ The bills are H.R. 5078, “The Waters of the United States Regulatory Overreach Protection Act,” in the 113th Congress, and H.R. 1732, “The Regulatory Integrity Protection Act,” in the 114th Congress.

⁸² CRS <http://www.fas.org/sfp/crs/misc/R40872.pdf>

⁸³ EIA, https://www.eia.gov/forecasts/aeo/section_energyprod.cfm.

⁸⁴ Mark Mills <https://www.manhattan-institute.org/html/where-jobs-are-small-businesses-unleash-energy-employment-boom-6029.html>

⁸⁵ INGAA, <http://www.ingaa.org/economicimpactreport.aspx>.

⁸⁶ American Chemistry Council, <http://www.prnewswire.com/news-releases/us-chemical-industry-investment-linked-to-shale-gas-tops-164-billion-300247206.html>.

⁸⁷ IHS, <http://epm.knoema.com/>, NERA, http://www.nera.com/content/dam/nera/publications/archive2/PUB_LNG_Update_0214_FINAL.pdf.

⁸⁸ API <http://www.api.org/~media/files/policy/american-energy/pro-v-regulatory-constraints-22-june15.pdf>

⁸⁹ State Department, <https://keystonepipeline-xl.state.gov/documents/organization/221135.pdf>.

1 million jobs and over \$1 trillion in economic activity.⁹⁰ Most of these projects are in the U.S., but a few, like Keystone XL, cross a national border, triggering additional scrutiny and opportunities for delay.

The environmental rationale for these project delays is highly questionable. Even low-emitting sources like hydroelectric power are subject to constraints on investment at existing facilities and a slow permitting process for new projects. Similarly, new pipelines for natural gas, the most clean burning fossil fuel, are routinely subject to permitting delays that can drag on for years.

In the case of nuclear energy, there are numerous regulatory and permitting issues, exacerbated by the fact that the Nuclear Regulatory Commission (NRC) has too many regulators at the present time. In anticipation of the growth of the nuclear industry and the crisis in Fukushima, Japan, the NRC's budget and staffing levels increased significantly over the past several years. However, the growth of new nuclear plants has been limited and NRC's workload has decreased. Excessive NRC staff can result in additional burdens on NRC licensees as staff initiates new regulatory activities to justify staffing levels.

The already-complex maze of energy regulations has been made considerably worse by the addition of global warming considerations. The combustion of fossil fuels results in unavoidable emissions of carbon dioxide, a greenhouse gas, and efforts to target these emissions are a serious and growing barrier to energy development and use. Despite no direct statutory authority from Congress to regulate on the basis of global warming potential (such legislation has been repeatedly rejected), the administration has promulgated numerous rules addressing greenhouse gas emissions from fossil energy use. Since 2009, the EPA has proposed or finalized over 100 global warming regulations, encompassing more than 5,000 pages in the federal register.⁹¹ The administration has also issued draft guidance through CEQ requiring the analysis of GHG emissions in all NEPA reviews.

Coal, which once generated more than half of America's electricity, has been the primary target. Its use is now in decline, due in large part to federal regulations. Every step of the process, from mining coal to using it in power plants has been subject to unprecedented restrictions. Particularly troublesome is the costly Utility MACT rule and the administration's Clean Power Plan placing severe constraints on new and existing coal-fired electricity generation. Oil and natural gas are also subject to global warming-related measures.

Notwithstanding questions about the extent and seriousness of global warming, even EPA admits that these rules would have a minuscule impact, often measured in terms of hundredths or thousandths of a degree change in temperatures decades from now.⁹² This raises serious questions about whether these costly rules are worth it.

Energy Regulations – A One-Way Street

Washington sees energy primarily as a source of pollution and not a source of jobs, prosperity and energy security. The environmental and public health benefits of regulations always get consideration (and are frequently exaggerated), while the adverse economic impacts are downplayed or ignored. The addition of global warming concerns greatly exacerbates the imbalance.

For example, the public health impacts of unemployment are very well documented. So regulations that increase unemployment may do more harm than good and warrant inclusion in any regulatory analysis. But such an even-handed approach is rarely applied by regulators when considering restrictions on American energy. Only the threats posed by energy (real or perceived) get consideration. Many energy regulations disproportionately burden low-income households, but again this is rarely a factor acknowledged by regulators.

⁹⁰ Chamber, Project No Project <http://www.projectnoproject.com/progress-denied-a-study-on-the-potential-economic-impact-of-permitting-challenges-facing-proposed-energy-projects/>

⁹¹

<http://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/documents/114/analysis/GHG%20RULES%20CHART%20April%206%2020166.pdf>

⁹² For example, EPA estimates that its rule targeting greenhouse gas emissions from cars and trucks for 2017-2025 will reduce temperatures by 0.0074 to 0.0176 degrees C by 2100, at a cost of \$157 billion dollars. One outside analysis of the Clean Power Plan finds it would reduce temperatures by 0.006 degrees C by 2050. <http://www.americaspower.org/wp-content/uploads/2015/09/Climate-Effects-Paper-August-6-2015.pdf>.

By supporting export markets, domestic energy production also provides non-economic geopolitical benefits. America can strengthen national security and help achieve its foreign policy goals by supplanting the influence of nations like Russia and Iran and others who once dominated global energy markets, while providing our allies with a less troublesome source of supply.⁹³ However, these very real geopolitical benefits play little or no role in regulatory decision making.

Taskforce Solution: The benefits of American energy are substantial and extend well beyond the states where it is produced and those directly involved. Any sensible regulatory scheme must fully consider them.

Congress has passed project-specific approvals for energy projects unnecessarily delayed or denied, such as one giving the green light for Keystone XL.⁹⁴ In addition, H.R. 3301, the North American Energy Infrastructure Security Act introduced by Rep. Jolly, would ensure that no future project gets caught up in additional red tape simply because it crosses the Canadian or Mexican border.⁹⁵ Congress will consider these and other specific project approvals and process reforms.

Hydropower was addressed in H.R. 8, the North American Energy Security and Infrastructure Act of 2015 introduced by Rep. Upton, which would remove impediments to investment in existing hydropower facilities and streamline approvals of new facilities.⁹⁶ H.R. 161, the Natural Gas Pipeline Permitting Reform Act introduced by Rep. Pompeo, would have put the natural gas pipeline approval process on a firm deadline. These and other efforts at streamlining approvals for projects will continue.⁹⁷

The North American Energy Security and Infrastructure Act of 2015 also contained provisions to create deadlines for federal approvals of natural gas export facilities. This bill also would, for the first time, would require federal regulators to consider the energy security implications of their decisions. These and other efforts in support for energy experts will continue.

On nuclear energy, the NRC must rigorously continue its efforts to right-size the agency, known as “Project AIM 2020,” and reassert discipline in the regulatory process to properly align NRC’s resources with its workload. This includes prioritizing the most safety-significant activities and increasing efficiency in managing the licensing process.

With regard to global warming, H.R. 3880, the Stopping EPA Overreach Act of 2015 introduced by Rep. Palmer would repeal all climate-change regulations under the Clean Air Act.⁹⁸ Bills were also introduced to repeal specific global warming rules, such as EPA’s two rules under the Clean Power Plan targeting new and existing electric generating units.⁹⁹ Republicans will continue to pursue these and other limits on costly global warming rules.

Regulations can and should be compatible with increased domestic energy production and use. If all factors are considered, Washington would only block domestic energy projects where there was not a clear net benefit. This includes coal mines and coal-fired power plants, whose benefits in terms of jobs and lower energy prices likely outweigh any realistic assessment of the risks. In particular, strict limits must be set on the applicability of new regulations to existing power plants and other affected facilities. House Republicans are committed to a federal role that enhances rather than impedes America’s energy renaissance.

The Added Challenges of Energy Production on Federal Lands.

A total of 640 million acres—or roughly 28 percent of our nation’s 2.3 billion onshore acres—is owned and managed by the federal government. This is larger than Greenland or Mexico, and by itself would be the 10th largest nation in the world. Of that total, the vast majority (609 million acres) is managed by four federal agencies: the National Park Service (NPS), the Bureau of Land Management (BLM), and the Fish and Wildlife Service (FWS) in the Department of the Interior (DOI), and the Forest Service (FS) in the Department of Agriculture. Furthermore, 94 percent of this vast federal acreage is located in just 12 western states. So while the federal government owns just 0.3 percent of the state of New York, it owns roughly 85 percent of the state of Nevada and over half of the acreage in states like Alaska, Idaho, Oregon, and Utah. While states

⁹³ <https://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/analysis/20140204LNGexports.pdf>

⁹⁴ <https://www.congress.gov/bills/112/congress/house-bill/1938>

⁹⁵ <https://www.congress.gov/bills/113/congress/house-bill/3301>.

⁹⁶ <https://www.congress.gov/bills/114/congress/house-bill/8/text>, sections 1201-1208.

⁹⁷ <https://www.congress.gov/bills/113/congress/house-bill/1900>.

⁹⁸ <http://thomas.loc.gov/cgi-bin/query/z?c114:H.R.3880>.

⁹⁹ H.J. Res. 71, H.J. Res. 72, at <https://www.congress.gov/bills/114/congress/house-joint-resolution/71>; <https://www.congress.gov/bills/114/congress/house-joint-resolution/72>.

generally have offshore jurisdiction extending from their shoreline out to either three or nine nautical miles, federal jurisdiction takes over from that point out to our nation's maritime boundaries. This puts the federal government in control of a whopping 1.7 billion acres of Outer Continental Shelf (OCS) acreage, an area just slightly smaller than Australia.

Western states are unable to collect property and other taxes derived from federal lands, and as a result, many counties dominated by federal land struggle to pay for such basic community services. The Payment in Lieu of Taxes program recognizes this inequity but falls woefully short of what actual property taxes and real economic development would provide. Other programs, such as the Secure Rural Schools (SRS) program, try to compensate localities for policies that shut down industry, but again, these fall short of the benefits provided by real economic activities, such as livestock grazing, logging, mining, and energy production.

Lack of True Multiple-Use of Federal Lands Continues to Jeopardize Economic Prosperity in Rural Communities

The National Forest Management Act and the Federal Lands Policy Management Act require federal agencies to manage federal lands on the basis of “multiple-use” so resource values are utilized in a “combination that will best meet the present and future needs of the American people.”¹⁰⁰ Recent updates of many BLM and USFS land-use plans direct how to manage large areas of federal lands, but they exclude most economic activities that allow for true multiple use of the land. These plans, which are valid for typically 15–20 years, contain many restrictions of land use, which makes undertaking multiple-use activities—including grazing, timber harvest, energy development, and recreation—difficult at best and impossible at worst. State and local governments are supposed to have input into federal-land decisions, but in practice, the federal agencies ignore or minimize their input and these lands are run from Washington. This has caused immense problems for States and counties, including diminished local tax bases, increased threats of wildfire, lack of private investment and job creation and decreased local, state, and federal tax and royalty revenue.

For example, a recently released BLM draft resource management plan for forests in western Oregon would lock up 75 percent of a 2.5 million acre planning area ostensibly to protect fish, water, wildlife, and other resource values.¹⁰¹ These forests are intended to be managed “for permanent forest production” and “the timber thereon shall be sold, cut, and removed in conformity with the principal of sustained yield for the purpose of providing a permanent source of timber supply, protecting watersheds, regulating stream flow, and contributing to the economic stability of local communities and industries, and providing recreational facilities.”¹⁰² Instead, these forests, like tens of millions of acres of other federal lands across the country, are now subject to top-down direction by the Obama administration that removes most lands from any economic activities, and leaves only minimal opportunities for activities that truly reflect the agency's multiple-use and sustained-yield mandate. By foregoing economic activities, federal government policies over time are strangling local economies. House Republicans have proposed specific solutions to a number of these problems, including the Resilient Federal Forests Act of 2015, introduced by Rep. Bruce Westerman, which passed the House of Representatives in July of 2015.¹⁰³

While various federal statutes (Federal Land Policy Management Act of 1976 [FLPMA], Mineral Leasing Act, and the Outer Continental Shelf Lands Act) directly require that lands be managed according to the principles of multiple-use, promoting the safe and expeditious development of mineral resources alongside other management priorities, the amount of federal acreage under lease for these purposes has declined sharply. This not only reduces the federal revenues generated from federal land, but also prevents private industry from employing workers, generating tax revenue and royalties, and producing American energy to reduce our dependence upon foreign imports.

Moreover, laws have empowered the executive branch to make decisions by fiat that withdraw lands from economic uses. The Antiquities Act of 1906 (Antiquities Act), unlike other land management statutes that require due process, gives the president the unilateral authority to set aside federal lands as a national monument without any procedural requirements. Originally intended to be applied in emergency situations to protect historical artifacts, it is now used to stop any economic use on federal land. The classic example is the creation of the nearly 2 million acre Grand Staircase-Escalante National

¹⁰⁰ 43 U.S.C. 1702

¹⁰¹ BLM Press Release: BLM Releases Proposed Plan to Increase Timber Harvest and Environmental Protections in Western Oregon Forests. April 12, 2016.

¹⁰² 43 U.S.C. §1181a

¹⁰³ H.R. 2647, 114th Cong. (2015).

Monument in Utah without *any* advance warning or public comment. Former President Clinton even announced the designation from the neighboring state of Arizona, instead of Utah. The Grand Staircase-Escalante National Monument has prevented the development of clean-coal resources, restricted responsible natural-gas development, and, in recent years, provided the reasoning for administrative actions intended to make cattle grazing expensive and difficult. And we may see history repeat itself. There are many who fear that another massive designation could inflict more economic pain on a region that relies on development activities on federal land. House Republicans want to make this process open and transparent, and ensure that states and local governments have more say in land designations.

With so much land on and offshore, the government owns huge amounts of energy that could be used to increase national and energy security, while promoting investment and creating jobs. Instead of encouraging such energy development, the government has steadily reduced access and increased hurdles to producing energy. For instance, in 1990, the BLM had roughly 64 million acres under lease with nearly 80,000 leases held by companies—that figure fell by 50 percent in 2015 to 32 million acres, with only 44,213 leases. OCS acreage under lease has also seen significant declines—with nearly 36 million acres under lease in 2011 and 6,592 active leases held—falling to 26 million acres under lease in April 2016 and 4,902 leases held. Valuable energy resources on tribal lands are suffering a similar fate. Solutions such as the Native American Energy Act introduced by Rep. Don Young¹⁰⁴ would help to spur economic development on these lands, providing tribes with an important revenue stream to fund essential services.

When Americans believe OPEC is withholding energy supplies to drive up prices, they become incensed. But their own government is doing the same thing. Reducing leased acreage and energy production have a very real impact on the revenues that energy development contributes to the federal Treasury. On average, revenues from oil and natural gas development on federal lands average \$11 billion per year—\$3 billion from onshore resources and \$8 billion from offshore resources.¹⁰⁵ However in 2015, the federal government generated just \$9.9 billion from mineral production on federal lands. In order to compare that figure with our nation's true capabilities, in 2008 our nation generated \$24 billion from mineral production on federal lands—and \$10 billion was from new leasing alone. In 2008, most of the income was generated from parcels that were leased decades ago.¹⁰⁶ That is why promoting access to leasing on federal lands is so crucial today: Opening federal land for American energy production will create jobs and economic security for future generations.

In some cases, both onshore and offshore lease sales have been flat out cancelled or prohibited. In November 2015, the BLM canceled a lease sale in Utah due to additional room capacity needed to accommodate increased attendance from individuals who wanted to protest and not participate in the lease sale—despite the fact that the BLM has authority provided by Congress to conduct Internet leasing. In addition, in 2015 the department cancelled the Chukchi and Beaufort lease sales in the Arctic—where offshore energy development is sorely needed to supplant falling throughput in the Trans-Alaska Pipeline System (TAPS).

This May, the Energy Information Agency affirmed that coal would be the second-largest energy source worldwide until 2030, and would remain a significant energy source for our nation for decades to come. Unfortunately, regulations like the Stream Buffer Zone rule, the Clean Power Plan, and ONRR Valuation rule lock this important resource away from future development. Furthermore, in early 2016, the administration enacted a complete prohibition on coal leasing on federal lands, under the guise of reviewing the royalty rates for coal. Legislation like the STREAM Act (H.R. 1644) introduced by Rep. Mooney and the Certainty for States and Tribes Act (H.R. 5259) introduced by Rep. Zinke would reverse these policies which seek to put this important source of affordable energy out of business.

Aside from just leasing, production on federal lands is struggling to keep pace with the national average. While the United States enjoys our renewed position in the world as a global energy leader, the massive growth in energy production has occurred on state and private lands. Since 2009, natural gas production on federal lands has fallen by 33 percent while production on state and private lands has skyrocketed by 55 percent.¹⁰⁷ Over the same period, crude oil production on

¹⁰⁴ H.R. 538, 114th Cong. (2015).

¹⁰⁵ https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/reports/51421-oil_and_gas_options-OneCol-3.pdf

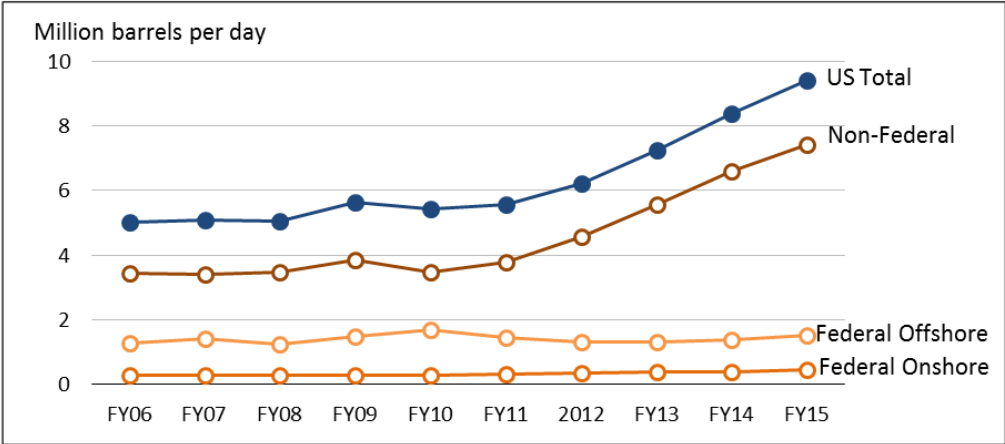
¹⁰⁶ In 2013, about 6 percent of royalty income from onshore oil and gas came from parcels that were leased in the previous 10 years; in contrast, about half came from parcels that were leased more than 50 years earlier. For offshore resources, about 8 percent of royalty income in 2013 came from parcels that were leased in the previous 10 years, and the majority came from parcels that were leased more than 20 years earlier.¹⁰⁶

¹⁰⁷ <http://www.crs.gov/reports/pdf/R42432>

state and private lands has increased by 92 percent, while stagnant production on federal lands has seen only 12 percent growth – with offshore production still struggling to surpass a high point in 2010.

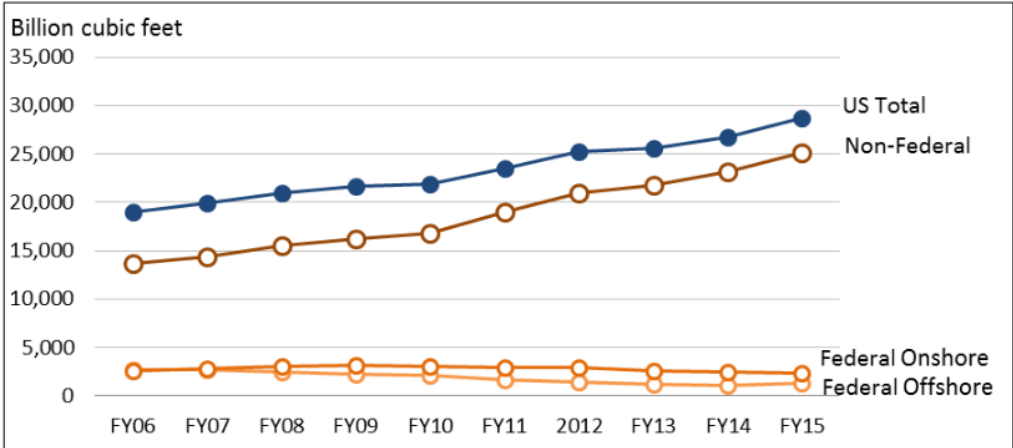
In addition to lagging domestic energy production on federal lands, domestic production of critical minerals has also suffered due in large part to excessive permitting delays and duplicative regulations. Proposals such as the National Strategic and Critical Minerals Production Act of 2015, introduced by Rep. Mark Amodei, are intended to lessen the United States' reliance on foreign sources of critical minerals, which are not only important to many industries, but are also vital to national security interests.¹⁰⁸

**Figure 1. U.S. Crude Oil Production:
Federal and Nonfederal Areas, FY2006-2015**
(million barrels per day)



Source: Federal data obtained from ONRR Statistics, <http://www.onrr.gov> (using sales year data). Nonfederal from EIA. Figure created by CRS.

**Figure 2. U.S. Natural Gas Production:
Federal and Nonfederal Areas FY2006-FY2015**



Source: Federal data obtained from ONRR Statistics, <http://www.onrr.gov> (using sales year data). Figure created by CRS.

¹⁰⁸ H.R. 1937, 114th Cong. (2015).

Restrictive regulatory hurdles on federal lands also prevent critical energy infrastructure needed to carry the benefits of our nation's domestic energy production to markets throughout the United States. The Department of the Interior has authority to permit rights-of-way across federal lands not only for power lines and natural gas pipelines, but also for renewable energy projects like solar arrays and wind turbines. Unfortunately this process is rife with permitting delays and other bureaucratic hurdles.

For example, the administration's most recent regulations aimed at cutting carbon emissions of existing power plants in the United States¹⁰⁹ will require energy companies to look to natural gas in the coming decades for electricity generation. While today natural gas generates 27 percent of electricity in the United States, EIA projects natural gas to generate 42 percent of total generation by 2040¹¹⁰. In addition, EIA projects industrial energy use to rise alongside the growth of our nation's shale gas supply. In order to meet this demand, power companies will need an increased buildout of natural gas pipeline infrastructure to carry domestic natural gas to growing markets.¹¹¹ Yet, several interstate pipeline projects seeking to move this natural gas to areas of the East Coast have faced significant delays related to areas where the pipelines need rights-of-way to cross federal lands.¹¹²

Furthermore, many natural-gas gathering line systems, which are an essential methane capture method at the wellhead, are tied up in the federal government's bureaucratic right of way (ROW) permitting process. While the BLM "strives to provide applicants a decision within 60 days of receipt"¹¹³ of an application, information provided to the House Natural Resources Committee clearly shows (chart below) that not one BLM regional office meets their own 60-day deadline – with some regions waiting over six-months for a decision. Solutions such as the National Energy Security Corridors Act of 2015, introduced by Rep. Tom MacArthur, or the Natural Gas Gathering Enhancement Act, introduced by Rep. Kevin Cramer, address these problems by directing the Secretary of the Interior to work with federal, state and local counterparts to plan and permit critical pipeline infrastructure in areas that make the most sense for natural gas pipeline crossings, while also ensuring the Department adheres to timelines.

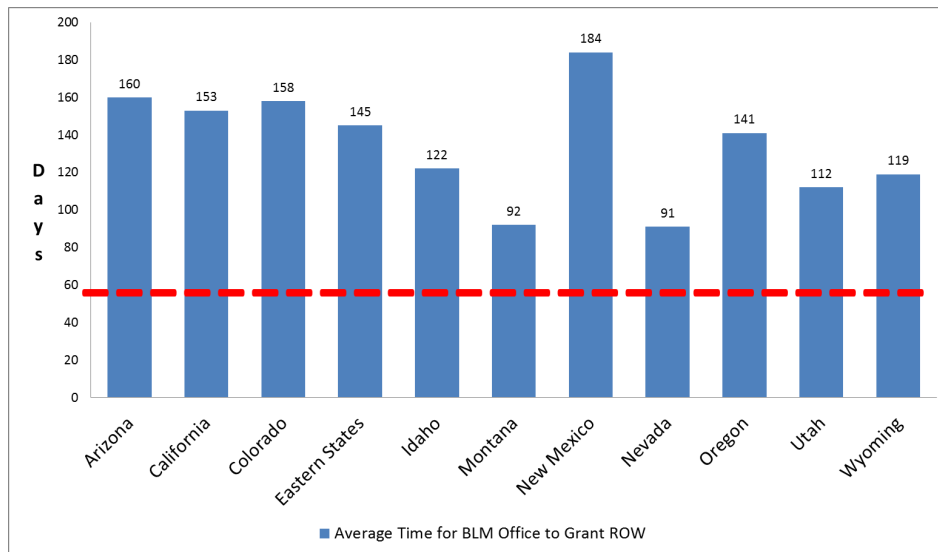
¹⁰⁹ <http://www2.epa.gov/carbon-pollution-standards/clean-power-plan-proposed-rule>

¹¹⁰ AEO 2015

¹¹¹ The Interstate Natural Gas Association of America (INGAA) estimates significant capacity growth of 43 billion cubic feet per day (Bcf) between 2014 and 2035 – predominately in northeastern and southwestern states which will likely result in significant coal plant retirements and therefore will have increased gas-fired capacity. INGAA estimates that over \$200 billion in capital expenditures will be dedicated to infrastructure expansion between 2014 and 2035. North American Midstream Infrastructure through 2035: Capitalizing on Our Energy Abundance; INGAA Foundation, March 17, 2014.

¹¹² Testimony provided in a hearing before the [House Natural Resources Committee on May 20, 2015](#), by a Williams Gas Pipelines representative outlined a project that involved drilling under National Park Service land – which took roughly six-years to get through the regulatory process. H.R. 2295 introduced by Rep. Tom MacArthur would address this issue and provide more regulatory certainty in permitting through National Park System lands.

¹¹³ [Obtaining a Right-of-Way on Public Lands \(BLM; 2009\)](#).



On average, it currently takes the BLM 227 days¹¹⁴ to approve or deny a permit to drill, while it takes states on average 33 days.¹¹⁵ Companies seeking to develop energy resources on federal lands could be waiting months, even years, for permit review with no certainty and little transparency to be able to clearly track the regulatory process. Even states like California have common sense backstops for permit review. The California Division of Oil, Gas and Geothermal Resources must respond within ten working days or the permit is automatically approved.¹¹⁶ The federal government has no such system. In other cases, the federal government's propensity to regulate by fiat has added months and even years of regulatory review prior to permit review. When developing offshore lease tracts, several companies have been required to jump through rigorous regulatory hurdles and additional information collections outside of the existing regulatory structure in order for their permit to simply be considered "deemed submitted."¹¹⁷ Only at that point does the federal agency start the clock to track permit approval timeframes.

New rulemakings and regulatory actions from the Department of the Interior severely impact all stages of the energy development supply chain on federal lands – from seismic surveying, through to leasing, and exploration, production and eventual remediation. In many cases, the cumulative impact that these new regulations will have when applied to just one federal lease block is astounding and could cause companies to choose to not develop or shut-in existing production rather than going forward with sizeable new compliance costs.

Finally, the cumulative impacts that multiple regulatory actions have to block one federal lease further compound access restrictions. In the remaining months of this administration, a substantial number of significant new regulations are pending finalization, and all threaten onshore and offshore energy production, including but not limited to the BLM's hydraulic fracturing rule, BLM's venting and flaring rule, BLM's onshore orders 3, 4, and 5, and BLM's Planning 2.0 and BOEM and BSEE's well control rule, offshore air regulations, financial assurance and risk assessment regulations, as well as the Arctic rule. When considered separately, the economic impact of such regulatory actions are enormous. And when compiled together, they are in many cases lethal to existing and future economic activity on federal lands.

¹¹⁴ U.S. Crude Oil and Natural Gas production in Federal and Nonfederal Areas; CRS, February 26, 2016; p. 9.

¹¹⁵ [Federal Western Production Lags in the 'Red Tape Nation'; Western Energy Alliance, February 24, 2015.](#)

¹¹⁶ California Public Resources Code, Section 3203 (a)

¹¹⁷ In November 2013, Shell Gulf of Mexico Inc. submitted a Revised Exploration Plan for development in the Burger prospect of the Chukchi sea off the coast of Alaska. The Bureau of Safety and Environmental Enforcement then required "additional information" including a substantial, supplementary document known as an "[Integrated Operations Plan \(IOP\)](#)." The plan was a recommendation of a 2013 BSEE Report – and required information largely duplicative of an Exploration Plan. Nonetheless, in order to continue to move forward through the regulatory process and for the Exploration Plan to be "deemed submitted," Shell had to submit an IOP which was purely for BSEE staff review and not offered for public comment. Nearly two years later, after additional information requests and multiple environmental consultations, Shell's revised exploration plan was "deemed submitted" on April 10, 2015, and conditionally approved on May 11, 2015.

Clearly, the status quo is not working. The safe and expeditious development of energy and minerals on federal land is a critical component of our nation's energy security. It reduces our dependence on foreign resources, while also providing important jobs and revenue for American families and businesses. Yet, all data points to regulatory hurdles that are limiting our nation's resource potential and driving energy production away from federal lands. A sensible balance must be achieved between energy development, conservation measures, and recreational access.

Task Force Solution: The 2017-2022 Five Year OCS Oil and Natural Gas Leasing Plan must be rewritten to ensure a measured approach that includes access to new OCS acreage in order to foster safe and responsible offshore energy production and lower energy prices in new regions throughout our nation. While the secretary of the Interior has authority to cancel lease sales at any moment, Congress should also authorize the secretary to add new lease sales to existing plans, with proper environmental analysis, in order to better respond to coastal state requests, global market dynamics, and national need. Offshore seismic research and analysis should be permitted directly through the Department of the Interior so we can move forward in collecting scientific research and data to better understand our nation's offshore resources and hazards.

Finally, there should be one agency at the Department of the Interior responsible for offshore energy development – including offshore renewable technologies – in order to promote a more streamlined and transparent regulatory approach that fosters collaboration, innovation and a focused and measurable annual goal of increased offshore energy production.

In order to reinvigorate the decades-old concept of multiple-use and be more responsive to the regional needs of their citizens, states should be provided greater access to management decisions and responsibilities over federal lands within their borders. States should be able to petition for increased economic activity within their borders, and be provided opportunity for managing the leasing, exploration, production, and reclamation in those areas in accordance with all applicable laws.

All regulatory actions through the Department must be fully transparent, and easily tracked with clear communication between the regulated community and the agency on important milestones throughout the process. All regulatory costs must be independently verified by an unbiased third party to provide greater scrutiny over economic findings. Congress should work to remove the incentives for frivolous and obstructive litigation. Finally, agencies at the Department should adhere to strict permitting deadlines or “shot clocks” just as states do in order to provide greater certainty and expediency in the regulatory process.

Balancing Wildlife Management with Economic Development

Recently, the Endangered Species Act (ESA) has been used to implement sweeping federal land management policy, especially in the western United States. In response to a proposed listing of the Greater Sage Grouse, federal land management agencies, working with the U.S. Fish and Wildlife Service, have imposed drastic restrictions across millions of acres of federal land. These agencies imposed these restrictions despite Greater Sage Grouse populations increasing by two-thirds since 2013 under state management.¹¹⁸ This is yet another example of federal regulation that is more restrictive but less effective than state regulation.

To compound the problem, many of these decisions are triggered by litigation, instead of through the typical regulatory process. For example, in 2011, 13 separate federal lawsuits under the ESA were settled, resulting in a massive settlement that would impact 1053 different species.¹¹⁹ By regulating via settlement, states and other interested groups are largely shut out of the process. And even the usual benefits of settlement—e.g., preventing future litigation—often are not realized in this context. In fact, the two environmental groups that were signatories to the agreement are still free to file lawsuits against the FWS, which they continue to do on a regular basis.¹²⁰

¹¹⁸ Analysis of Greater Sage-grouse Lek Data: Trends in Peak Male Counts, available at:

http://www.wafwa.org/news/e_1606/News/2015/8/ WAFWA_Report_Documents_Greater_Sage-Grouse_Population_Rebound.htm

¹¹⁹ Endangered Species Act Congressional Working Group Report, at 8. Available at:

<http://lummis.house.gov/uploadedfiles/esaworkinggroupreportandrecommendations.pdf>

¹²⁰ Allison Winter, Petitions for new species protection wobble balance in FWS settlement, agency says, E&E News, Aug 7, 2012.

Taskforce Solutions: House Republicans are pursuing numerous policy initiatives that would modernize and streamline federal wildlife management. Legislation passed in the House of Representative during the 113th Congress would limit frivolous lawsuits and provide increased transparency into the science used in listing determinations.¹²¹ The proposals contained in this bill were reintroduced in the 114th.¹²² Additional legislation would provide states and other interested parties with notice of pending ESA lawsuits that have a direct impact on policy development, so that these interested parties, including states, have the opportunity to defend those interests in settlement negotiations.¹²³

Another way forward to improving the implementation of the ESA is by providing clear recovery goals, in order to ascertain progress and establish certainty for the regulated community. Once a species is listed, the goal of the ESA is to recover the species so that it can be delisted. If the regulated community, state officials, and land-owners do not know what “recovery” actually means, then it discourages efforts to attain that goal.

Congress needs to provide clear direction to federal species management agencies. Through rulemaking and guidance, the FWS and NOAA Fisheries Service have given themselves authorities that may not have been intended by Congress. The ESA has not been updated in over 25 years. House Republicans intend to pass legislation that provides clear limitations to agency discretion, in order to provide regulatory certainty and to ensure that policy decisions are made those elected to make policy decisions, not unelected bureaucrats.

The Growing Expense of Environmental Reviews

The National Environmental Policy Act of 1969 (NEPA) requires a thorough examination of the environmental impacts before any major federal action can be undertaken (such as issuing a permit for construction). Over the years since NEPA has passed, compliance with NEPA has become an increasingly burdensome and expensive requirement. According to a 2014 study conducted by the National Association of Environmental Professionals, federal agencies took an average of 1709 days, or 4.7 years, to complete environmental impact statements. This is an increase of over 500 days, up from 1200 in 2000. Costs for an EIS can run into the many millions of dollars. Additionally, NEPA creates unnecessary duplication because agencies are limited in their ability to use studies from other similar projects or reviews conducted under other federal or state regulatory requirements, forcing them to start from scratch.

Task Force Solutions: House Republicans will focus on reforming NEPA to eliminate delays, unnecessary duplication, and frivolous litigation, and give worthy projects a timely green light.

This can be done by allowing agencies to incorporate, in whole or in part, existing and previously completed environmental reviews and analyses done under other federal/state regulatory or permitting processes, state NEPA (or state equivalent) reviews, or reviews done for similar projects.

Alternatives and mitigation measures that must be studied should be limited to only those that are feasible to maintain the integrity of the project. Destructive delays can be minimized by creating time limits and litigation delays can be reduced by ensuring only those with sufficient standing can sue and by shortening the lengthy statute of limitations.

¹²¹ H.R. 4315, 113th Cong. (2014).

¹²² H.R. 3162, 114th Cong. (2015) (, H.R. 2109, 114th Cong. (2015); H.R. 1667, 114th Cong. (2015); H.R. 2352, 114th Cong. (2015).

¹²³ H.R. 585, 114th Cong. (2015)

Financial Services

Empowering All Americans to Achieve Financial Independence

Regulators have an important role to play in making sure consumers and investors have all the facts necessary to make informed decisions, but excessive regulation has empowered regulators to substitute their judgment for that of consumers and investors, and make decisions for them about what financial products or services they should be able to access.

Consumer choice is being eliminated. Before Dodd-Frank, 75 percent of banks offered free checking.¹²⁴ Two years after it passed, only 39 percent did so. Bank fees have also increased, leading to a rise of the unbanked and underbanked among low- and moderate-income Americans.

One of the most disturbing aspects of Dodd-Frank is that it takes away consumer choice, empowering bureaucrats to control huge swaths of the economy and to regulate consumer behavior. For example, the director of the Consumer Financial Protection Bureau (CFPB), a new federal agency created by Dodd-Frank, can declare any consumer-credit product “unfair” or “abusive” and outlaw it. The CFPB’s funding is not subject to congressional appropriations – making its unelected director patently unaccountable. While the bureau was designed to regulate the financial industry, in reality, it is micromanaging consumers’ everyday lives, deciding which car they can buy, what kind of mortgage they qualify for, and limiting their access to lines of credit, credit cards, and free checking.

Other misguided and burdensome bureau policies include: enriching class action trial lawyers at the expense of consumers by prohibiting mandatory arbitration clauses that prevent class action lawsuits; and inconveniencing consumers by delaying closing on their new home purchase due to a complicated disclosure rule. The perceived benefit of any bureau policy must be weighed against the cost in economic growth and choice for American consumers.

Task Force Solution: Fundamentally reforming the CFPB. To protect consumers and the rule of law, House Republicans support a number of solutions to increase accountability.

- *Turn CFPB into a bipartisan, five-member commission that’s focused on enforcing the law and creating financial opportunity for Americans.* The bureau is headed by a single Director who serves a five-year term and may be removed by the president only for cause—that is, “for inefficiency, neglect of duty, or malfeasance in office”—rather than at will. Rep. Randy Neugebauer, chairman of the Financial Institutions Subcommittee, sponsored H.R. 1266, the Financial Products Safety Commission Act, which makes the CFPB a stand-alone agency governed by a five-member, bipartisan commission.
- *Subject CFPB to congressional appropriations to bring accountability and transparency to their operations.* The bureau is exempt from the checks and balances of the budget and appropriations process, which means that its director can spend hundreds of millions of dollars with no oversight. At a minimum, the bureau must be subject to the same oversight as other product regulators. The Taking Account of Bureaucrats’ Spending Act, H.R. 1486, sponsored by Rep. Barr, places the CFPB on budget and restores Congress’s constitutional oversight role.
- *Establish an Inspector General for the CFPB.* The Bureau of Consumer Financial Protection-Inspector General Reform Act of 2015, H.R. 957, sponsored by Rep. Steve Stivers, creates an independent Inspector General for the CFPB.

Small Banks and credit unions are being squeezed out: Regulatory costs on credit unions have increased by \$2.8 billion since Dodd Frank was adopted, with a disproportionate cost being borne by credit unions with less than \$100m in assets. Furthermore, now one in every four employees is devoted to regulatory compliance rather than core business functions. In addition, higher regulatory compliance costs force companies of all sizes to pass those costs on to their customers in the form of higher prices and diminished credit availability.

¹²⁴ “Plastic Stochastic: Capping fees on card transactions has not worked out as planned,” The Economist (Oct. 4, 2014), available at <http://www.economist.com/news/finance-and-economics/21621882-capping-fees-card-transactions-has-not-worked-out-planned-plastic-stochastic>.

Task Force Solution: Regulatory Relief for Community Banks and Credit Unions: House Republicans support immediate relief for community banks and credit unions, including:

- H.R. 2896 – Rep. Scott Tipton's bill levels the playing field by allowing regulators to tailor their regulations to fit a bank's or credit union's small size and business model.
- H.R. 1941 – Rep. Lynn Westmoreland's legislation provides financial institutions with more ability to appeal or oppose exam findings without incurring retaliation from a regulator.
- H.R. 3791, Rep. Mia Love's bill allows more small banks and savings and loans to access capital that can be used to make loans and offer new loan products.

Regulation is putting mortgages out of reach: The Federal Reserve (Fed) found that CFPB's "Qualified Mortgage" rule (QM) will have a tremendously negative effect on minority borrowers. According to the Fed, 34 percent of African-Americans who borrowed to buy a home in 2010, and 32 percent of Hispanic borrowers, will be unable to meet the rule's rigid debt-to-income ratio requirements but for a temporary exemption.¹²⁵ Once this exemption expires, rather than protecting borrowers, the bureau's rule will simply shut them out of the mortgage market.

In fact, the American Bankers Association's Twenty-First Annual Real Estate Lending Survey found that 33 percent of respondents said that they plan to reduce their mortgage lending to only the QM segment of the market, while a further 29 percent of respondents said that even though they would make non-QM loans, they would restrict non-QM loans to specific groups.¹²⁶

According to a survey by the Independent Community Bankers Association (ICBA), 73 percent of community bank respondents said regulatory burdens are preventing them from making more residential mortgage loans and 44 percent said they originated fewer first-lien residential mortgage loans in 2014 compared with the year before.¹²⁷

Task Force Solution: Helping qualified homebuyers get into a home they can afford to keep. House Republicans support legislation to create a sustainable housing finance system. We would wind down the government sponsored enterprises Fannie Mae and Freddie Mac, whose top managers engaged in extensive accounting fraud to trigger huge executive bonuses, while collapsing our economy. In addition, we must restore the Federal Housing Administration's ability to serve first-time and low- to moderate-income borrowers by clearly defining its mission and guaranteeing access to a 30-year mortgage.

We will work to advance these goals with other solutions like:

- H.R. 1210, the Portfolio Lending and Mortgage Access Act sponsored by Rep. Andy Barr, which would allow lenders to customize loans to a borrower's individual needs if the financial institution agrees to bear 100 percent of the risk on the loan.
- H.R. 650, Rep. Fincher's legislation to amend the Truth in Lending Act to modify the definitions of a mortgage originator and a high-cost mortgage;
- H.R. 685, Rep. Huizenga's Mortgage Choice Act, which increases affordable options for borrowers by providing clarity to the calculation of points and fees in mortgage transactions, allowing more loans to be classified as Qualified Mortgages;
- H.R. 2121, sponsored by Rep. Steve Stivers, which will foster an efficient marketplace and competition between banks and nonbanks by ensuring Mortgage Loan Officers originating mortgages at depository institutions are able to move to non-depository institutions with a minimal amount of work disruption.

¹²⁵ www.federalreserve.gov/pubs/bulletin/2013/pdf/2012_HMDA.pdf

¹²⁶ http://www.aba.com/tools/function/mortgage/documents/2014_realestatesurvey.pdf

¹²⁷ <http://www.icba.org/files/ICBASites/PDFs/2014ICBACommunityBankLendingSurveyExecSummary.pdf>

Consumer credit is being squeezed: Access to *non-mortgage* consumer credit has also declined sharply in the post-Dodd-Frank period. In the case of credit card lending, intrusive regulation by the CFPB, Basel III capital standards, and credit card “reforms” enacted by the Democrats in 2009 have combined to deny millions of Americans the benefits and convenience offered by these products, while hiking the costs of those who are fortunate enough to still qualify for credit.

According to the FDIC’s National Survey of Unbanked and Underbanked Households released in October 2014, 7.7 percent of American consumers were unbanked and 20 percent were underbanked in 2013. One of the main obstacles for these groups in obtaining a checking or savings account is the fees associated with the accounts, which have gone up since the passage of Dodd-Frank. In fact, *Bloomberg* reported on a study by Javelin Strategy and Research that showed new Dodd-Frank regulations fueled a 21 percent surge in checking fees between 2006 and 2012.¹²⁸

The CFPB’s attempt to shut down small-dollar lenders through regulatory fiat is disturbing. It threatens to cut off the *roughly 51 million American consumers who are unbanked or underbanked* from accessing this financial lifeline to deal with unexpected emergencies. And in many cases, it is the only type of credit available to them. Dodd-Frank has put bank accounts—once the first rung on the ladder of financial inclusion—out of reach for millions of younger and lower-income Americans, forcing them to rely on alternative financial services. Reducing availability and increasing the cost of short-term credit will only hurt these most vulnerable Americans.

Task Force Solution: Facilitate consumers’ access to credit and other customer services to further financial inclusion. House Republicans will work to stop the CFPB from banning financial products that many consumers want or need. House Republicans support the repeal of CFPB’s authority to ban certain products or services. In addition, H.R. 1195, introduced by Rep. Robert Pittenger, creates a small business advisory board to ensure that job creators have the opportunity to weigh in on matters of concern, and for the CFPB to learn about market conditions affecting these businesses. H.R. 957, Rep. Steve Stivers’ legislation, ensures greater accountability at the CFPB by creating an independent Inspector General for the CFPB. Finally, H.R. 1486, Rep. Andy Barr’s legislation, ensures that the CFPB is accountable to the American people, by bringing the Bureau into the normal and transparent congressional appropriations process.

House Republicans also support repealing rules like indirect auto lending guidance that were based on inadequate and inappropriate research and hurt consumers trying to finance a car. The bureau has created enormous uncertainty in the indirect auto lending market by issuing guidance without allowing for a public notice and comment period and also basing its actions on flawed data. Rep. Frank Guinta sponsored H.R. 1737, the Reforming CFPB Indirect Auto Financing Guidance Act, rescinds the CFPB’s flawed guidance relating to indirect auto lending that will result in higher costs for consumers attempting to buy a car or truck.

House Republicans will also continue to work to support an innovative environment for solutions-based approaches to the unbanked and underbanked. This includes improving access to traditional banking services as well as new technologies and innovations that improve financial inclusion. House Republicans will also continue to support efforts to promote financial health and education.

Regulation is reducing retirement options: The Department of Labor recently issued the final version of its controversial “fiduciary” regulation that will harm millions of lower and middle-income Americans by raising the costs of financial planning. This 1,000-page rule would apply new fiduciary responsibilities to broker-dealers when they provide advice to retail or individual investors, like families saving for retirement or college. Many have expressed concerns that this rulemaking could increase costs and limit the availability of products and advice for retail investors. In fact, the SEC itself acknowledges that the costs of this action could “ultimately be passed on to retail investors in the form of higher fees or lost access to services and products.” This will result in low- and middle-income Americans losing access to financial planning advice.

This rule is Obamacare for American’s IRAs and 401(k)s, and just like Obamacare it will likely raise costs and potentially limit choices—ultimately jeopardizing Americans financial independence and retirement security.

Task Force Solution: Protecting the retirement security and investment choices for all Americans. House Republicans will fight to guarantee that Americans who like the financial advice they receive can keep it. Broker-dealers are already held to a standard of care known as suitability, and they provide a variety of financial products and services to customers. We support legislation that would ensure investors from all economic backgrounds have freedom of choice and access. That’s why the

¹²⁸ <http://www.bloomberg.com/news/articles/2012-02-29/regulation-fuels-21-surge-in-bank-checking-fees-javelin-says>

House passed H.R. 1090, the Retail Investor Protection Act, Rep. Wagner's legislation and H.J.Res. 88, Rep. Roe's resolution to stop this harmful rule.

Smarter Regulations for Financial Institutions that Choose to Invest in Their Safety

There is general agreement that in the run-up to the financial crisis, too many financial institutions had too little capital, which compromised their ability to withstand the crisis. As with many other aspects of the financial crisis, the inadequate capitalization of large U.S. financial institutions was exacerbated by failed government policies.

Beginning in 1988, U.S. banking regulators promulgated a series of regulations under the Basel Capital Accords that were intended to ensure that large, complex banking organizations operated with sufficient capital, but they ended up having the exact opposite effect. Not only were those rules overly complex and costly, but their improperly designed "risk weights" encouraged banks to crowd into subprime mortgage-backed securities and other toxic assets that provided the dry tinder for the 2008 financial conflagration. Rather than making banks safer, the Basel rules made them more fragile.

Higher levels of capital produce a more resilient banking system, less prone to periodic crises, which in turn provides more reliable support for economic growth.

Task Force Solution: A new regulatory paradigm offers highly-capitalized, well-managed financial institutions an option for relief from excessive regulatory complexity. House Republicans support the option for strongly-capitalized financial institutions to qualify for significant relief from duplicative and overly burdensome regulatory mandates, thereby promoting a more resilient financial sector, simplifying an overly complex regulatory system, and reducing the power and influence of Washington bureaucrats. Put simply: If you are strongly-capitalized, you should only have to comply with a simple set of regulations rather than dozens of complicated and conflicting rules.

Banks will opt in to this new regime only if it lets them better serve customers at lower prices – in other words, to become more competitive. This approach does not *require* anybody to raise a dime of new capital. Rather, it allows banks to choose to operate in a regulatory environment in which the governing principle is market discipline – not bureaucratic complexity – and in which equity investors stand in for taxpayers the next time a "too big to fail" firm collapses. The Republican plan allows banks that credibly commit to stop betting with taxpayers' money to get out from under the suffocating constraints of Dodd-Frank.

In an era where agreement on financial regulatory matters is hard to come by, support for a regulatory model allowing banks to operate at higher capital levels in exchange for relief from government micro-management is surprisingly broad-based.

End Bailouts and Demand Accountability from Wall Street

Dodd-Frank codifies "too big to fail": Far from ending bailouts, the Dodd-Frank Act codified them—in the form of the "Orderly Liquidation Authority" set forth in Title II of the Act. Under the Dodd-Frank regime, the largest financial institutions in America remain "too big to fail;" in fact, they are even bigger now than they were before the crisis.

Dodd-Frank's regime for designating "systemically important financial institutions" (SIFIs) anoints a new generation of "too big to fail" financial firms, signaling to market participants that these firms will benefit from government support in the event of their financial distress. In the words of Richard Fisher, the president of the Dallas Federal Reserve Bank, "as soon as a financial institution is designated systemically important . . . it is viewed by the market as being the first to be saved by the first responders in a financial crisis. SIFIs occupy a privileged position in the financial system." That implicit guarantee allows the bank to borrow more cheaply than its smaller competitors.

The "too big to fail" doctrine makes the financial system more fragile, which in turn makes bailouts more likely: The prospect of government bailouts makes creditors indifferent to the bets that financial institutions are making with the funds they borrow, which further increases risk in the financial system.¹²⁹

¹²⁹ Jeffrey Lacker, the President of the Richmond Federal Reserve, has described "too big to fail" as consisting of "two mutually reinforcing problems. First, creditors of some financial institutions feel protected by an implicit government commitment of support should the institution become financially troubled. Second, policymakers often feel compelled to provide support to certain financial institutions to insulate creditors from losses." Ending 'Too Big to Fail' Is Going to be Hard Work, Address at the Global Society of Fellows Conference 1-2 (May 9, 2013), https://www.richmondfed.org/press_room/speeches/president_jeff_lacker/2013/pdf/lacker_speech_20130409.pdf.

“Too big to fail” also violates the basic tenets of a free enterprise system. It interrupts the normal operation of markets and rewards the imprudent and reckless while punishing the prudent and productive; it undermines equal treatment and the rule of law by privatizing profits and socializing losses; and it undermines public faith in the economic system by failing to hold businesses and individuals accountable for the consequences of their actions.

Dodd-Frank makes taxpayer bailouts permanent: The “Orderly Liquidation Authority,” where government officials, operating in almost total secrecy, decide which financial firms will “fail” and which of those firms’ creditors will be protected from loss – and which will not – has been likened to a “Star Chamber.” By promoting expectations that government will come to the rescue of large financial institutions and insulate their creditors and counterparties from losses, the Dodd-Frank subverts market discipline and makes future bail-outs more (not less) likely.

A resolution under Title II of Dodd-Frank is funded through the “Orderly Liquidation Fund,” which is capitalized using the proceeds of obligations issued by the FDIC and purchased by the Treasury Secretary.¹³⁰ Thus, the “Orderly Liquidation Fund” can be tapped to make loans to the firm being resolved or its “covered subsidiaries,” acquire debt, purchase assets or guarantee them against loss, assume or guarantee obligations, and make payments, including payments to creditors and counterparties of the failed firm.¹³¹ If these authorities sound familiar, it is because they are the exact same tools that the government deployed during the financial crisis to carry out multiple rescues of large financial firms, including the \$43 billion in payments to the creditors and counterparties of the failed insurance company AIG, many of which were large European banks.

House Republicans Will End Bailouts and Demand Accountability from Wall Street: House Republicans will protect hardworking taxpayers by ending Wall Street bailouts and “too big to fail” (TBTF). We support repealing Washington bureaucrats’ ability to declare big financial companies as “Systemically Important Financial Institutions” (SIFIs) that receive special government protection.

If a safe, strong, resilient financial system in which crises are less frequent is our objective, the solution is obvious: we must end bailouts. The Republican commitment to insist on “bankruptcy not bailouts” does exactly that.

Task Force Solution: House Republicans will protect hardworking taxpayers by ending Wall Street bailouts and “too big to fail” (TBTF). We support repealing Washington bureaucrats’ ability to declare big financial companies as SIFIs that receive special government protection.

House Republicans also support repealing Title II of Dodd Frank and replacing bailouts with enhanced bankruptcy. The House passed the Financial Institution Bankruptcy Act—H.R. 2947 sponsored by Rep. David Trott—to create a new subchapter of the Bankruptcy Code tailored to address the failure of a large, complex financial institution. In addition, H.R. 4894, sponsored by Rep. Lynn Westmoreland, repeals Dodd-Frank’s “Orderly Liquidation Authority” to protect taxpayers from having to pay the costs of bailing out large financial institutions or their creditors. Also, Rep. Bill Huizenga’s FORM Act, H.R. 3189, limits the Federal Reserve’s ability to bail out specific institutions, using its authority under section 13(3) of the Federal Reserve Act. House Republicans also support prohibiting the use of the Exchange Stabilization Fund to bail out financial firms or their creditors and repealing the FDIC’s authority to guarantee bank debt during times of severe economic stress.

Task Force Solution: Strengthen penalties for wrongdoing. Our solution toughens civil and criminal penalties for individuals and institutions that engage in wrongdoing—because the best way to deter corporate wrongdoing is to hold individuals accountable for their misconduct. In order to more fully hold Wall Street accountable to investors and the capital markets, House Republicans support enhanced civil penalties for financial fraud and self-dealing, including legislation that:

- Expands the SEC’s and DOJ’s authority to obtain monetary penalties for the most serious securities law violations.
- Significantly increases the cap for the most serious securities law violations.
- Increases the maximum civil penalty amounts that can be assessed for violations involving financial institutions.

¹³⁰ Pub. L. 111–203

¹³¹ Pub. L. 111–203

SEC Enforcement Is Inconsistent: The SEC's regulatory failures prior to the financial crisis were not a result of a lack of statutory authority, rather it was a lack of regulator will. The SEC staff ignored the whistleblower who called their attention to the Madoff Ponzi scheme. The SEC failed to thoroughly examine certain entities that helped exacerbate the financial crisis.

Republicans support a number of provisions contained in Title IX of the Dodd-Frank Act to improve the work of the SEC's Division of Enforcement and better fulfill the investor protection component of its statutory mission. Republicans do not support the Dodd-Frank Act's expansion of the SEC's power to use in-house agency administrative courts to prosecute securities law violations.

Task Force Solution: Republicans will improve the SEC's enforcement program by instituting additional due process protections such as H.R. 3798 for respondents in SEC enforcement actions, limiting the power of SEC in-house courts and placing the responsibility for the imposition of penalties with the Senate-confirmed SEC commissioners.

Demand Accountability from Washington Regulators

FSOC

The Financial Stability Oversight Council's politicized structure and penchant for secrecy are emblematic of a "shadow regulatory system" that is both contrary to democratic principles and harmful to the U.S. economy. FSOC politicizes the regulatory process by concentrating authority in the hands of its members who, with one exception, are presidentially-appointed heads of regulatory agencies, and by excluding those agencies' other members. This structure not only distorts the lines of accountability and expertise among regulators, it distorts the balance that exists within regulatory agencies and erodes their independence.

The FSOC has ignored the expertise and experience of the primary regulators – the very people the law empowers to police our markets – in making its SIFI designations and assessing potential sources of systemic risk. Rather than using sound economic analysis and risk modeling to support its SIFI designations, the FSOC has instead relied on far-fetched, highly speculative worst-case scenarios to justify a massive expansion of the federal government's control over the economy.

Task Force Solution: While House Republicans continue to fight to end the practice of too big to fail by ending the SIFI-designation process, they support immediate relief, including:

- H.R. 1550 – Rep. Dennis Ross's FSOC Improvement Act, which increases transparency of FSOC and provides an opportunity for a company to eliminate risk on its own rather than being designated "systemically important."
- H.R. 3557 – the FSOC Accountability and Transparency Act sponsored by Rep. Scott Garrett makes the FSOC subject to both the Government in Sunshine Act and the Federal Advisory Committee Act, and allows all members of the commissions and boards represented on FSOC to attend and participate in FSOC meetings.
- H.R. 3857 – Rep. Luke Messer's legislation sets requirements before FSOC can designate a non-bank financial institution for heightened Fed supervision.
- H.R. 3340 the Financial Stability Oversight Council Reform Act sponsored by Rep. Tom Emmer makes FSOC and the Office of Financial Research accountable to taxpayers by making both part of the regular congressional appropriations process.
- H.R. 1309 the Systemic Risk Designation Improvement Act of 2015 sponsored by Rep. Blaine Luetkemeyer replaces the arbitrary \$50 billion threshold for bank SIFI designations with a multi-factor test.

Federal Reserve: An independent central bank remains a cornerstone of American economic prosperity and House Republicans are committed to continuing to ensure that the Fed is insulated from undue political pressure in conducting monetary policy. However, our economy would be healthier if the Federal Reserve was more predictable in its conduct of monetary policy and more transparent about its decision-making. Today Americans are merely left with so-called "forward guidance," which unfortunately remains vague and improvisational, and leaves hardworking taxpayers uncertain as they attempt to plan their economic futures.

Task Force Solution: We need to modernize the Federal Reserve and bring it into the 21st century. Legislation sponsored by Rep. Bill Huizenga and approved by the House – the Fed Oversight Reform and Modernization Act (the FORM Act) does the following:

- Protects the Fed's independence to chart whatever monetary policy course it deems appropriate, but requires the Fed to give the American people a greater accounting of its actions.
- Requires the Fed to generate a monetary policy strategy of its own choosing in order to provide added transparency about the factors leading to its monetary policy decisions.
- Helps consumers and investors make better decisions in the present and form better expectations about the future. These improvements are important for Americans to enjoy greater economic opportunity. By pursuing this expansion through increased transparency instead of policy mandates, the FORM Act further insulates the Fed from political pressures.

In addition, the House Republicans would subject the Fed's prudential regulatory activities – along with those of the other federal financial regulators – to the congressional appropriations process, handing the people's elected representatives an important tool with which to hold these bureaucracies accountable and achieve greater transparency in government operations.

Improve Transparency and Fairness: Secrecy and lack of accountability can lead to abuse by Washington regulators.

Task Force Solutions:

- H.R. 2287 – Rep. Mick Mulvaney's legislation sets requirements to improve transparency and accountability in the National Credit Union Administration's budgeting process.
- H.R. 3798 – Rep. Garrett's legislation permits private persons to compel the SEC to seek legal or equitable remedies in a civil action instead of an administrative proceeding.
- H.R. 766 – Rep. Luetkemeyer's legislation prevents federal banking agencies from abusing executive power when preventing businesses from using depository institutions.

End-User Reforms: Financial markets exist to help businesses access capital and manage their risks. While the Dodd-Frank Act specifically exempted end-users from most of its mandated regulations, the reality is far different. Many end-users have been caught up in the intricate web of new Dodd-Frank rules put forward by regulators, like the CFTC, who have used the response to the financial crisis as an opportunity to expand their footprint and demand information and compliance from market participants who did not cause the financial crisis.

As American businesses struggle with an anemic economy and the new regulatory burdens imposed by the Dodd-Frank Act, Congress should make sure that regulators are not imposing unnecessary regulations, simply because they have the power to do so.

Task Force Solution: The House of Representatives passed H.R. 2289, the Commodity End-User Relief Act introduced by Rep. Conaway, which included provisions that would:

- rein in unnecessary reporting and record-keeping requirements on end-users, like grain elevators, farmers, agriculture counterparties, and other commercial market participants
- preserve important risk management contracts for energy suppliers
- protect important non-bank financial institutions' ability to serve end-users
- retain safe harbors for commodity hedgers from position limits
- prevent end-users from being classified as financial entities because of their risk management practices.

Congress should continue to closely track regulations developed under the auspices of the Dodd-Frank Act to ensure that they don't remove important risk management tools from the Main Street businesses who rely on them.

Cybersecurity: Americans are rightfully worried about becoming the victims for the next major data breach and Congress must insist that Americans' personal financial data is protected. Data breaches subject consumers to uncertainty and confusion and increase consumers' vulnerability to identity theft, leading to further inconvenience and possible financial loss. As technology advances and personal data becomes its own currency, consumers face an escalating risk of identity theft and financial fraud from criminals, many of them operating overseas, seeking to access their personally identifying data. The increasing frequency and sophistication of cyberattacks demands heightened vigilance and enhanced efforts by industry participants to safeguard consumers' financial data.

Task Force Solution: House Republicans are developing legislation to ensure stronger protections for consumers against identity theft and fraud as well as legislation to ensure that sensitive information that is submitted to the government is fully protected from cyberattack.

H.R. 3738, Rep. Ed Royce's legislation, requires the Office of Financial Research (OFR) to provide a detailed strategic plan regarding its priorities and to develop and implement a cybersecurity plan to protect the data that it collects.

Evaluate the full cost of regulations and improve coordination: Constantly adding layer after layer of new regulations without ever repealing outdated ones is drowning consumers and small businesses in red tape and discouraging new startups from ever being created. To help consumers and our economy, we support legislation to streamline regulations, eliminate duplicative or conflicting regulations, and require regulators to take into account the cumulative effect of Washington's regulatory burden to date.

Task Force Solution: For example, House Republicans support:

- H.R. 414 – Rep. Bill Huizenga's Burdensome Data Collection Relief Act, which repeals a burdensome, unneeded and expensive requirement of the Dodd-Frank Act for publicly traded companies so they can instead focus resources on job creation and economic growth.
- H.R. 2354 – Rep. Robert Hurt's legislation that directs the SEC to review its significant regulations to determine whether such regulations are necessary in the public interest or whether they should be amended or rescinded.
- H.R. 2187 – Rep. David Schweikert's legislation to expand the pool of eligible investors in private securities offerings.
- H.R. 1675 – Rep. Randy Hultgren's legislation to modernize a Federal securities law threshold last updated in 1999 to expand the ability of small private companies to reward more employees with stock ownership and not have to be treated like a large public company.

Regulatory Coordination: Financial regulators were tasked with implementing a massive regulatory undertaking with the passage of Dodd-Frank. The CFTC and the SEC, as well as the prudential regulators, share regulatory jurisdiction over the over-the-counter (OTC) derivatives markets and their participants. This has resulted in a patchwork of rules and definitions between our domestic regulators.

Task Force Solution: Financial regulators must work together to build seamless rules for derivatives markets participants. Congress should require agencies to harmonize their rulemakings to simplify compliance burdens and improve oversight.

Rules Affecting Education and the Workforce

Students and workers continue to face a number of difficult challenges. College costs are on the rise. Millions of individuals are in a desperate search for full-time jobs. Many students are not receiving the high quality education they need to succeed in life. Working families continue to face stagnant wages and are struggling to get by until their next paycheck. We need rules of the road that promote the best interests of students, workers, school administrators, and employers. Federal policies should help support strong, successful schools and workplaces, helping to provide all Americans an equal chance to excel in the classroom and the workforce.

In the early days of the Obama administration and in the midst of the Great Recession, former White House Chief of Staff Rahm Emmanuel famously said: “You never let a good crisis go to waste. And what I mean by that it’s an opportunity to do things you think you could not do before.” That is precisely what this administration has done, imposing sweeping change on schools and workplaces through expansive new rules and regulations—usually without public input or congressional support. This failed regulatory agenda has prolonged the crisis and inflicted more harm on the American people. House Republicans are determined to roll back flawed regulatory policies and advance real solutions that will help provide all Americans an equal opportunity to receive a quality education and earn a lifetime of success.

End the Era of Governing by Executive Fiat

Despite years of failing to spur the economy and create jobs through top-down policies, the President continues to push a flawed economic agenda through executive fiat. The Obama administration has imposed sweeping changes to education and workforce policies that often run contrary to the law and congressional intent behind the law. These changes have repeatedly taken the form of “guidance” or “letters of interpretation,” with the sole intent to circumvent the formal rulemaking process and deny the public an opportunity to review and comment on these regulatory changes.

For example, the Department of Education’s Office for Civil Rights enforces civil rights laws that affect state education agencies, public elementary and secondary school systems, colleges and universities, state vocational rehabilitation agencies, and certain libraries and museums, among other entities. Under the current administration, the office has issued more than 30 “guidance” documents – an unprecedented figure – that have vastly expanded civil rights laws beyond what Congress intended. The Department of Labor has routinely used a similar tactic, changing behind closed doors wage and hour policies that impact 135 million workers in more than seven million workplaces.

While administrative guidance is not supposed to carry the full force of federal law, schools, colleges, universities, and workplaces risk a host of punitive enforcement actions if they fail to comply, including costly litigation or the loss of federal funds meant to support educational opportunities for low-income students. The result of the administration’s heavy-handed approach is new rules and mandates, developed with little public input or congressional support that negatively affect the strength and competitiveness of the nation’s schools and workplaces.

Case Study: Unilateral Changes to Rules Affecting Federal Contractors

The President has signed a number of executive orders directing the Department of Labor to force federal contractors—including many small businesses—to set certain wage and benefit policies. The President has also signed an executive order that will unfairly deny federal contracts to an employer who is *alleged* to have violated more than a dozen federal labor laws and equivalent state laws. The employer would also be denied a federal contract if his or her subcontractors and suppliers are alleged to have run afoul of these numerous laws. Federal bureaucrats—who may not even have expertise in federal labor law—will be empowered to review an employer’s compliance history and decide whether the employer’s actions demonstrate a “lack of integrity of business ethics.” No employer with a history of violating worker rights should be rewarded with federal contracts paid with taxpayer dollars. That is precisely why a suspension and debarment system already exists to hold these bad actors accountable. The executive order merely adds another layer of bureaucracy onto a federal procurement process that is already plagued by delays and expensive inefficiencies.

Case Study: New Restrictions on Independent Contractors

In July 2015, the Department of Labor issued guidance “clarifying” who qualifies as an independent contractor under the *Fair Labor Standards Act*.¹³² Despite the desire of independent contractors to be self-employed and the benefits to employers and consumers of utilizing independent contractors, this sub-regulatory action confines the American workforce to an employer-employee relationship that is not suited for the 21st century. The new guidance, combined with the department’s aggressive enforcement, is alarming to employers who utilize the services of independent contractors. These include companies that are part of the emerging “sharing” economy, such as Uber, Airbnb, and TaskRabbit. Particularly in light of the new and evolving sharing economy, the end result is fewer opportunities for workers and entrepreneurs, fewer innovative services for American consumers, and greater costs and burdens for employers.

¹³² This sub-regulatory action was undertaken via a WHD Administrator’s Interpretation, which was not subject to notice and public comment under the APA. Administrator’s Interpretation No. 2015-1. (July 15, 2015) Available at: http://www.dol.gov/whd/workers/misclassification/ai-2015_1.htm.

Case Study: Redefining “Employer”

The administration is currently engaged in a concerted effort to redefine what it means to be an employer. Discarding years of settled labor policies, the administration is systematically expanding the definition of employer to include those who have indirect or even the potential to control employment decisions. This will extend legal liabilities to employers who are not directly in control of employment decisions outside their workplaces, such as franchisors working with franchisees and contractors working with subcontractors. The goal is to empower regulators, trial lawyers, and union organizers to hold as many employers as possible accountable for alleged labor violations. This effort is taking place across multiple federal agencies, including within the Department of Labor as it enforces the *Fair Labor Standards Act*, the *Migrant and Seasonal Agricultural Worker Protection Act*, and the *Occupational Safety and Health Act*.¹³³ It has also been implemented by the political appointees at the National Labor Relations Board.¹³⁴ This expansive regulatory scheme threatens to upend countless small businesses and make it even more challenging for entrepreneurs to realize the dream of running their own business.

Case Study: Union Organizers Interfering in Health and Safety Inspections

In February 2013, the Occupational Safety and Health Administration (OSHA) issued a letter of interpretation dramatically changing what is known as “walkaround rights,” a long-standing policy concerning the presence of third parties during a safety inspection.¹³⁵ Federal policy has long maintained that inspectors can bring third parties onsite provided they are recognized union representatives or have a specific technical expertise to contribute to the inspection. OSHA had not allowed union representatives to accompany an inspector on a nonunion worksite. However, under the administration’s new sub-regulatory change, third parties may now accompany an inspector even if they are not employees of the business being inspected. The department has failed to explain how these non-employee “inspectors” will be treated in relation to liability concerns, confidential business information, and safety training. This is just another significant change to federal labor policy that empowers union leaders to organize American businesses, while denying workers and employers a fair chance to voice their views and concerns.

Task Force Solution: Provide greater congressional scrutiny. Congress must continue its rigorous oversight of all regulatory actions initiated by the executive branch. As part of this effort, congressional committees will review all information and data that form the basis for issuance of an executive order or presidential memorandum, as well as continue aggressive oversight under the next administration. Congress should also consider establishing a regulatory review commission, making use of Bureau of Labor Statistics studies and expanding the *Regulatory Flexibility Act*, as tools to evaluate existing regulations and new regulatory proposals and their impact on the economy.

Task Force Solution: Demand meaningful opportunities for public input in the rulemaking process. Although executive orders may imply urgency on the part of federal agencies, Congress must ensure regulatory activities associated with executive action are not hurried through the regulatory process. Congress must insist agencies provide stakeholders notice and an adequate period for public comment, as well as ensure informal guidance is only used by federal agencies to truly clarify confusion with the regulations and not create new requirements or policies.

Task Force Solution: Rein in the use of “guidance” to advance significant regulatory changes. House Republicans will work to prevent federal agencies from issuing sub-regulatory guidance that has a significant impact on the economy without public notice or an opportunity for the public to comment. While there may be a need for more informal guidance in order to keep pace with the changing environment in one particular industry or another, federal bureaucrats must not be permitted to create brand new requirements and standards through this opaque process.

¹³³ Administrator’s Interpretation No. 2016-1. (Jan. 20, 2016) available at: http://www.dol.gov/whd/flsa/joint_Employment_Al.htm.

¹³⁴ 362 NLRB No. 186 (Aug. 27, 2015) available at: <https://www.nlrb.gov/cases-decisions/board-decisions?volume=362>.

¹³⁵ Letter of Interpretation “Whether workers at a workplace without a collective bargaining agreement may authorize a person who is affiliated with a union or a community organization to act as their representative under the Occupational Safety and Health Act.” (Feb. 21, 2013) available at: https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=28604

Task Force Solution: Implement best practices to ensure responsible regulatory guidance. In April 2015, the Government Accountability Office (GAO) published a study concerning four departments—including the Departments of Labor and Education—and their procedures and use of sub-regulatory guidance.¹³⁶ GAO found the Department of Labor needed to update its practices for issuing sub-regulatory guidance and had not consistently applied the Office of Management and Budget's requirements for issuing significant guidance.¹³⁷ In addition, GAO recommended both departments strengthen the use of internal controls in its processes for producing sub-regulatory guidance production process and improve its online guidance dissemination processes.

Promote Responsible Policies for the Nation's Schools and Workplaces

Federal policies can play an important role in many facets of American life, such as college access and worker health and safety. On numerous occasions, House Republicans have offered to work with the administration in developing new regulatory policies that will help provide greater clarity and certainty to employers, schools, colleges, and universities, while also ensuring strong protections for workers, students, and families. Unfortunately, the Obama administration has routinely pursued a my-way-or-the-highway approach, preferring to put forward extreme, partisan rules that will actually hurt the men and women these new rules are intended to help.

Case Study: Expansive New Overtime Rule

Federal overtime rules are extremely complex and outdated. Employees who are exempt from federal overtime rules must first meet several tests, including minimum salary requirements (currently not less than \$455 per week/\$23,660 per year) and specific job duties requirements.¹³⁸ Too often employers get tripped up by bureaucratic red tape that does more to promote the interests of trial lawyers, rather than protect the rights of America's workers. Rather than engage in a responsible process to streamline and modernize federal overtime rules, the Department of Labor has finalized a flawed rule that will do more harm than good. The administration's final overtime rule more than doubles the salary threshold, while doing nothing to simplify and improve the duties tests that continue to create confusion and legal challenges for workers and employers. This extreme, partisan approach will hurt the very people the administration claims it is trying to help. The rule will stifle workplace flexibility, destroy jobs, limit opportunities for low-skill and low-wage workers to climb the economic ladder, impose additional labor costs on small businesses, raise college costs, and hurt the ability of countless nonprofit organizations to serve vulnerable people across the country.¹³⁹

Case Study: Restricting Students' Access to Higher Education

Since 2009, the Department of Education has held 14 negotiated rulemaking sessions on higher education issues, churning out numerous packages of regulations with little regard for the true implications and costs for higher education institutions. One of the most egregious examples of regulatory overreach is the gainful employment regulation, which spans 945 pages in order to define two words, "gainful employment." This rule will negatively impact approximately 1,400 programs, jeopardizing federal financial aid for 840,000 students.¹⁴⁰ The gainful employment regulation will ultimately result in fewer choices for students—especially low-income and minority students—looking to further their education and eager to pursue a lifetime of opportunity and success.

¹³⁶ Government Accountability Office, GAO-15-368, "Regulatory Guidance Processes, Selected Departments Could Strengthen Internal Control and Dissemination Practices," (Apr. 2015) available at: <http://www.gao.gov/assets/670/669689.pdf>

¹³⁷ Pursuant to an OMB Bulletin issued in March 2009, OMB's Office of Information and Regulatory Affairs (OIRA) reviews some significant guidance documents prior to issuance. All significant guidance documents, whether reviewed by OIRA or not, are subject to the OMB Bulletin. "Economically significant guidance documents" are also published in the Federal Register to invite public comment. The OMB Bulletin directs each agency to develop written procedures for the approval of significant guidance, establishes standard elements that must be included in significant guidance documents, and requires agencies to maintain a website to assist the public in locating significant guidance documents. Non-significant guidance is not subject to the OMB Bulletin, and guidance procedures are left to agency discretion. Office of Management and Budget, Guidance for Regulatory Review, M-09-13. (Mar. 4, 2009) available at: https://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_fy2009/m09-13.pdf.

¹³⁸ Memorandum from President Obama to Sec'y Perez Updating and Modernizing Overtime Regulations (Mar. 13, 2014) available at: <https://www.whitehouse.gov/the-press-office/2014/03/13/presidential-memorandum-updating-and-modernizing-overtime-regulations>.

¹³⁹ Public comment from the National Head Start Association and undersigned State and Regional Head Start Associations on the WHD's Proposed Rule: "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees." (Sept. 4, 2015) available at: <https://www.regulations.gov/#/documentDetail;D=WHD-2015-0001-5194>.

¹⁴⁰ <https://www2.ed.gov/policy/highered/reg/hearulemaking/2012/gainful-employment-fact-sheet-10302014.pdf>

Case Study: Exacerbating Colleges Costs with More Red Tape

The administration has expanded federal control over higher education in other areas, including academic affairs, teacher preparation, and the financial services students receive on college campuses. These regulations put Washington in the middle of issues that have always been the responsibility of institutions and states. They also increase compliance costs on institutions, forcing colleges and universities to consider raising tuition or shifting resources away from student services. Finally, these new rules will stifle innovative teaching and learning practices that are helping students receive a quality education at a faster pace and lower cost.

Case Study: Restricting Access to Affordable Retirement Advice

More than 64 million workers¹⁴¹ now hold \$4.6 trillion¹⁴² in 401(k) savings, and 41.5 million households hold \$7.4 trillion in Individual Retirement Accounts.¹⁴³ Despite this significant investment in retirement savings, far too many Americans still retire without financial security. For this reason, it is disturbing that the Obama administration continues to be hostile to the flexibility of individual retirement savings. The administration's flawed policies have made it harder for workers and retirees to receive investment advice and more expensive to deliver information to an increasingly tech-savvy populace. The most egregious example is the Obama administration's recently-issued rule to change the definition of "fiduciary."¹⁴⁴ This ill-conceived rule will restrict access to affordable, financial advice, making it more difficult for low- and middle-income families to save and plan for retirement. Additionally, fewer small businesses will offer employees a retirement plan because the small business owners will lose access to financial advice.

Case Study: Rewriting the Rules to Promote a Culture of Union Favoritism

It is hard to imagine a federal agency that has imposed more radical change on America's workplaces than the political appointees at the National Labor Relations Board (board or NLRB). This partisan federal agency is made up of unelected board members who have significant power to determine and implement policies impacting workers and privately-owned business. Since 2009, the NLRB has consistently pursued an agenda that favors union activism while turning a blind eye to the concerns of employers, workers, and rank-and-file union members. For example, unions have long sought to organize small groups or "units" of employees as an incremental step toward organizing an entire workplace. In 2011 *Specialty Healthcare* decision, the board imposed a new standard that ensures the NLRB approves virtually every unit of employees proposed by union organizers, no matter how small the group of employees may be.¹⁴⁵ The board has also adopted new rules to encourage ambush union elections that will deprive employers of their right to speak to employees, stifle the right of workers to make informed decisions, and jeopardize the privacy of workers and their families. These troubling actions are in addition to other actions by the board that have restricted access to secret ballot elections, made it more difficult for workers to challenge union representation, and weakened protections for neutral employers from union attacks. Together, these actions have overturned decades of settled labor policies in order to benefit union leaders at the expense of workers and employers.

Task Force Solution: Repeal onerous higher education regulations. While federal rules can serve an important role in providing institutional accountability, each federal rule and reporting requirement levied on schools, colleges, and universities carries its own cost that is ultimately passed onto students. Therefore, Congress must eliminate burdensome higher education regulations, like the gainful employment regulation, that were made outside of statutory changes and are not in line with congressional intent. Issues like this should be thoughtfully vetted and addressed through the normal legislative process. These regulations are a counterproductive impediment to colleges and universities trying to serve their students. Congress can help strengthen higher education and control costs by removing burdensome and duplicative federal requirements that prevent institutions from delivering higher education in more creative, cost-effective ways.

¹⁴¹ Department of Labor, Employee Benefits Security Administration, "Private Pension Plan Bulletin," September 2015, available at <http://www.dol.gov/ebsa/pdf/2013pensionplanbulletin.pdf>.

¹⁴² Investment Company Institute, 2015 Investment Company Fact Book 141 (2015).

¹⁴³ Id. at 137 and 152.

¹⁴⁴ Federal Register, "Definition of the Term 'Fiduciary;' Conflict of Interest Rule-Retirement Investment Advice (Apr. 2015) available at: <https://www.federalregister.gov/articles/2016/04/08/2016-07924/definition-of-the-term-fiduciary-conflict-of-interest-rule-retirement-investment-advice>

¹⁴⁵ 357 NLRB No. 934 (Aug. 26, 2011) available at: <https://www.nlrb.gov/cases-decisions/board-decisions?volume=357>.

Task Force Solution: Reform the rulemaking process at the Department of Education. Congress must improve the Department of Education's regulatory process by establishing clearer rules aimed to improve transparency and the ability for the public to provide meaningful feedback. The *Every Student Succeeds Act* includes significant reforms that limit the administration's regulatory authority, improve transparency, and provide Congress with more oversight of the administration's rulemaking proposals. House Republicans will continue to aggressively oversee the Department's implementation of the law. Building on the achievements of this law, House Republicans will pursue similar reforms to the regulatory process in the *Higher Education Act*. These reforms will establish minimum comment periods, limit the use of emergency rules, and provide a congressional notice and comment period (in addition to the required public comment period). Through these and other reforms, Congress can help more Americans pursue the dream of a college degree by helping to control compliance costs, encourage innovation, and stop unnecessary regulations that will lead to higher college costs.

Task Force Solution: Advance responsible policies to strengthen retirement security. House Republicans will continue to advocate for policies that ensure workers and retirees have access to savings options that are voluntary, portable, and secure. We will work to promote policies that will help more American workers retire with the dignity and financial security they deserve. As part of that effort, Congress will work to eliminate unnecessary federal regulations that add to the cost of providing workers opportunities to save for retirement, such as legal restrictions that hamper the ability of employers to provide information about retirement benefits electronically and impede individuals from receiving affordable investment advice. Congress should modernize and streamline these rules, because they only serve to drive up costs. House Republicans will also work to make it easier for employers to band together to offer 401(k)s by eliminating bureaucratic restrictions that prevent small businesses from offering these valuable retirement plans.

Task Force Solution: Hold the rogue National Labor Relations Board accountable to workers and employers. House Republicans will continue to conduct aggressive oversight of the NLRB's attempts to implement policies and regulations skewed in favor of special-interest union supporters. House Republicans will continue to advocate for legislative solutions that overturn the board's extreme agenda and restore labor policies that have served workers and employers well for decades, including legislative solutions that will guarantee fair union elections, reinstate the traditional joint employer standard, and ensure bargaining units promote the best interests of all workers in a workplace. These solutions will help prevent the disruption of countless small businesses, protecting the rights of hardworking Americans, and preserve the ability of entrepreneurs and others pursue the American dream.

Internet, Communications and Technologies Industry

The internet, communications and technology industry is routinely among the largest parts of the U.S. economy in capital expenditures, including billions of investment in broadband alone. The Federal Communications Commission (FCC) regulates this industry and provides a good example of the many issues discussed throughout this paper: outdated statutes, outdated rules, a lack of transparency, and the need for reform.

Case Study: The FCC's Treatment of the Internet as a Utility

Despite the success of the largely unregulated Internet, the FCC has long sought to have more regulatory control over it.¹⁴⁶ These efforts culminated in the FCC's February 2015 order applying Title II of the Communications Act of 1934—law written for the monopoly telegraph era—to assert regulatory control over Internet access in the name of an “open Internet.”¹⁴⁷

There is widespread agreement that bright-line rules that protect the way packet data is treated on networks would be beneficial for consumers and consistent with free-market business practices. However, proponents of reclassification as a utility under Title II seek to take the FCC's jurisdiction over the Internet and twist it beyond the technological regulation of the treatment of packets and instead employ economic regulation to control the *counting* of packets, regulating the Internet like the Ma Bell system of our telecommunications past. This would effectively prohibit “free” data. The best examples of the type of consumer-focused program threatened by economic regulation of broadband are the free data programs wireless providers have begun deploying for their customers that allow unlimited streaming of audio and video content.¹⁴⁸

Moreover, the so-called “general conduct standard” that the FCC adopted amounts to a blank regulatory check to second-guess American businesses. The general conduct standard essentially permits the FCC to address anything it cares to if the agency feels it isn't compatible with its vision of the Internet.

American consumers have benefitted from the flexibility to innovate in service offerings beyond the rate regulated world of the Bell monopoly. In addition, the certainty that the FCC would not intercede and scuttle innovative business models has allowed consumers to benefit from new offerings and companies to get real-world market feedback on whether their innovations are welcomed by consumers. The overhang of FCC rules that permit not only economic regulation of Internet service plans, but after-the-fact second-guessing of business decisions by FCC bureaucrats will mean fewer choices for consumers and stalled innovation.

By addressing concerns about consumer protection on the Internet through bright-line rules and limiting the FCC's ability to introduce uncertainty into the market through second-guessing business models, Congress can strike a balance between consumer protection and fostering innovation.

Taskforce Solution: Legislation offered by Chairman Upton of the Committee on Energy and Commerce and Chairman Greg Walden of the Subcommittee on Communications and Technology in January 2015 addresses consumer concerns without granting the FCC blanket authority to second-guess American business.

In the competitive market for Internet access service, particularly the wireless broadband market, participants routinely compete for customers not only on price, but on innovative service plans. This flexibility allowed the early wireless industry to innovate in service offerings, eliminating the concept of long-distance service, plans that included “buckets of minutes”, and subsidizing customer equipment through contracts. As ISPs continue to push to bring Americans the fastest, most robust Internet experience, the country cannot afford to cast the FCC's dark shadow of the question of how to innovate.

This legislation will create a consumer-friendly, bright-line rules that both Republicans and Democrats agree will protect consumers. It will also prevent the FCC from using broad grants of authority to make the rules up as it goes along, or from regulating the economics of the broadband plans Americans prefer.

¹⁴⁶ See, e.g. Preserving the Open Internet, GN Docket No. 09-191, WC Docket No. 07-52, Report and Order, 25 FCC Rcd 17905 (2010), *aff'd* in part, vacated and remanded in part sub nom. Verizon v. FCC, 740 F.3d 623 (D.C. Cir. 2014).

¹⁴⁷ Protecting and Promoting an Open Internet, GN Docket No. 14-28, Notice of Proposed Rulemaking, 29 FCC Rcd. 5561 (2014).

¹⁴⁸ See, e.g. “Binge On” available at <http://www.t-mobile.com/offer/binge-on-streaming-video.html>.

Case Study: The FCC's Biennial Review of Its Rules

The Communications Act requires the FCC to review the entirety of its rules every two years—codified in Title 47 of the Code of Federal Regulations—and consider removing regulations that are no longer in the public interest. Unfortunately, this presents the agency with all the wrong incentives. Agencies are unlikely to remove regulations as they would limit the scope of the agencies authority, requiring an affirmative showing of a need for the regulations to be reinstated, along with proper process under the Administrative Procedure Act.

The result is a process that every two years identifies outdated regulations, but rarely achieves its intended goal: a smaller, focused, up-to-date Code of Federal Regulations.

The FCC's rules should be modern, updated frequently, and tailored to address the concerns of the 21st century communications marketplace. Leaving outdated rules on the books stifles innovation and provides an opportunity for the agency to apply rules adopted under premises or for completely different technologies than they were originally intended. American consumers—and other Internet users worldwide—have benefitted greatly from the era of unfettered innovation and disruption the Internet has fostered. A bloated, outdated Code of Federal Regulations threatens to slow that innovation.

Taskforce Solution: The biennial review currently places the burden on the public to show that a rule is no longer needed. By changing the presumption to require the agency to justify the continued existence of its rules, it places the burden of regulation on regulators and will ensure that the agency must continually evaluate whether their rules are serving the American public. House Republicans will continue to seek to reduce regulatory burden through a presumption that the Commission's rules must expire absent justification for their continued existence.

Case Study: The FCCs Lack of Transparency

The Federal Communications Commission operates largely in secret. In the FCC's process, once a notice of proposed rulemaking is issued, the public is not permitted to see any of the commission's work until the rules have been voted into law. Moreover, notices of proposed rulemaking do not always contain proposed rules. This leaves the public in the dark until the FCC has decided to share its new, enforceable rules with the world.

In practice this means that the staff of the commission drafts new rules and presents them to the chairman. If the chairman approves, they are circulated to the rest of the commission, who are banned from letting the public see the text of the new rules they are being asked to adopt. A series of bilateral negotiations between commissioners (all conducted in secret) make changes to the proposed rules. When all proposals have been addressed through adoption or rejection (all in secret), the commissioners are asked to vote on whether to adopt the rules, again while the public is left wondering what new rules the FCC is planning to inflict on the information economy.

Administrative procedure is meant to give the public a meaningful chance to participate in the regulatory process. The FCC's rules eliminate any real chance of public input by conducting the vast majority of the process in secret. Beyond the possibility of seeing draft rules in the NPRM, the American public doesn't have any opportunity to see what rules the FCC is adopting until they are already a done deal, voted and placed in the Code of Federal Regulations. This not only denies consumers the chance to have their voices heard as the commission nears its decision, but also shuts out expert input that could produce a stronger, more targeted set of rules with fewer unintended consequences on American consumers.

Taskforce Solution: H.R. 2583, The FCC Process Reform Act of 2015 introduced by Rep. Walden, passed the House unanimously on November 16, 2015. It is currently awaiting action in the Senate. Additionally, H.R. 2589 (Rep. Ellmers), H.R. 2592 (Rep. Kinzinger), and H.R. 2593 (Rep. Latta) have been reported out of the Committee on Energy and Commerce and seek to make additional targeted changes to improve FCC process and transparency. House Republicans will continue to seek to improve FCC transparency and process in order to provide for a small, more nimble, and responsive commission to serve the 21st century needs of an information economy.

Litigation Reform

The federal litigation system, like the federal regulatory system, imposes its own sorts of dysfunctional rules. A series of proposals would help prevent phony lawsuits from running a wasteful litigation system that imposes unfair costs on innocent people.

Impose Mandatory Sanctions on Frivolous Lawsuits in Federal Court

The Lawsuit Abuse Reduction Act (LARA) is a one-page bill that makes it *mandatory* for the victims of frivolous lawsuits filed in federal court to be compensated for the harm done to them by the filers of frivolous lawsuits. It may come as a surprise to many, but current Rule 11 of the Federal Rules of Civil Procedure allows judges to deny the victims of frivolous lawsuits any compensation for the harm they suffered, even when the judge determines the lawsuit against them was frivolous (meaning the lawsuit has no basis in law or fact). As a result, the current Rule 11 goes largely unenforced, because the victims of frivolous lawsuits have little incentive to pursue additional litigation to have the case declared frivolous when there is no guarantee of compensation. Also, current federal rules allow lawyers to file frivolous pleadings without penalty as long as they withdraw those pleadings within 21 days, even if the victims of the frivolous lawsuit had to spend time and money defending themselves from the frivolous pleadings while they were pending.

LARA would (1) restore mandatory sanctions for filing frivolous lawsuits in violation of Rule 11, (2) remove Rule 11's "free pass" provision that currently allows lawyers to avoid sanctions for making frivolous claims by withdrawing frivolous claims after a motion for sanctions has been filed, and (3) require monetary sanctions, including attorneys' fees and compensatory costs, against any party making a frivolous claim. LARA doesn't change the existing standards for determining what is or is not a frivolous lawsuit under Rule 11; it simply provides that if a judge finds a case is frivolous under current law, the victim of the frivolous lawsuit must be compensated.

LARA applies to cases brought by individuals as well as businesses, including business claims filed to harass competitors and illicitly gain market share. The bill also applies equally to both plaintiffs and defendants.

The victims of frivolous lawsuits are real victims. They have to shell out thousands of dollars, endure sleepless nights, and spend time away from their family, work, and customers, just to respond to frivolous pleadings. Few would ever claim that judges should have the discretion to deny damage awards to victims of legal wrongs proved in court. And so why should judges have the discretion to deny damage awards to victims of frivolous lawsuits who prove in court that the case brought against them was frivolous? Victims of frivolous lawsuits are real victims and they deserve to be guaranteed compensation when they prove in court that the claims against them are frivolous.

Task Force Solution: House Republicans will seek the elimination of frivolous lawsuits through enactment of the Lawsuit Abuse Reduction Act.

Prevent Filing Class Actions That Include Uninjured Parties

Last year, an independent research firm surveyed companies in 26 countries and found that 80 percent of those that were subject to a class action lawsuit were U.S. companies, putting those U.S. companies at a distinct economic disadvantage when competing with companies worldwide.¹⁴⁹ And the problem of overbroad class actions doesn't just affect U.S. companies. It affects consumers in the United States, who are forced into lawsuits they don't want to be in—because the median rate at which consumer class action members take the compensation offered in a settlement is an incredibly low 0.023 percent.¹⁵⁰ Only the tiniest fraction of a percent of consumer class action members bother to claim the compensation awarded them. That's clear proof that vastly large numbers of class members are satisfied with the product they purchased, don't want compensation, and don't want to be lumped into a gigantic class action lawsuit.

So where is all the money going in these cases? To the lawyers who brought the lawsuits that hardly anyone wanted to be in.

¹⁴⁹ See http://www.nortonrosefulbright.com/files/20150514-2015-litigation-trends-survey_v24-128746.pdf.

¹⁵⁰ Declaration of Deborah McComb Re Settlement Claims April 21, 2014, at 2, available at <http://blogs.reuters.com/alison-frankel/files/2014/05/duracellclassaction-mccombdeclaration.pdf>

Today, trial lawyers know how to work the system. For example, they will file lawsuits against a company that sells a washing machine. Some very small percentage of those washing machines don't work the way they're supposed to, though the vast majority of them do. But the lawyers file a class action lawsuit that includes everyone who ever purchased a washing machine from the company, even the large number of people who are completely satisfied with their purchase. When trial lawyers lump injured or non-comparably injured people into the same class action lawsuit, the limited resources of the parties are wastefully spent weeding through hundreds of thousands of class members in order to find those with actual or significant injuries. That's money that could have been spent compensating deserving victims.

Sometimes, because judges don't separate the injured from the non-injured in class actions early enough in the proceedings, they end up throwing out settlements because it turns out hardly any of the class members were harmed, and didn't want compensation. Other times, when judges realize they've created an overbroad class, they justify their actions by coming up with novel theories to provide some compensation to people who are entirely satisfied with the product, and don't want compensation. Either way, the solution is to direct judges to determine as best they can, early in the proceedings, which proposed class members are significantly and comparably injured, and those who aren't, and to treat them accordingly. That's fair to everyone.

The purpose of a class action is to provide a fair means of evaluating like claims, not to provide a way for lawyers to artificially inflate the size of a class to extort a larger settlement value for themselves, and in the process increase the prices of goods and services for everyone. Claims seeking monetary relief for personal injury or economic loss should be grouped in classes in which those who are the most injured receive the most compensation. No one should be forced into a class action with other uninjured or minimally injured members, only to see their own compensation reduced.

The Fairness in Class Action Litigation Act would simply make clear what currently should be clear to the federal courts, namely that uninjured class members are incompatible with Rule 23(b)(3)'s current requirement that common claims predominate a class action.

The bill doesn't prohibit the filing of any class actions at all. It simply requires that if class actions are filed then similarly injured people should be grouped with other similarly injured people in their own class action. Claims seeking monetary relief for personal injury or economic loss should be grouped in classes in which those who are most injured receive the most compensation. No one should be forced into a class action with other uninjured or minimally injured members, only to see their own compensation reduced. And this proposal will prevent that injustice.

Task Force Solution: House Republicans will seek the elimination of class-action lawsuits for the non-injured or non-comparable injuries through enactment of the Fairness in Class Action Litigation Act.

Prevent Addition of Businesses or Individuals Solely for Venue Shopping Purposes.

When a citizen from one state sues a defendant from another state, the inter-state nature of that lawsuit gives federal courts jurisdiction over the case. But current law allows trial lawyers to forum shop, and keep their cases in the state courts they prefer, if they sue a defendant from another state and simply also sue an additional local defendant in the state in which they're filing the case. Not surprisingly, these rules have been abused by trial lawyers who fraudulently sue local defendants—even though the plaintiff's claims against those defendants have little or no support in fact or law—because suing those local defendants allows trial lawyers to keep their case in a preferred state court forum.

Today, to avoid federal court jurisdiction and forum shop in state court, trial lawyers have a number of “go-to” local defendants they name, depending on the type of lawsuit. In personal injury lawsuits, such as slip-and-fall claims, against retailers, hotels, and other national businesses, trial lawyers include a local store manager or employee as a defendant. In product liability actions, trial lawyers include in the lawsuit a local distributor, the neighborhood shop that sold the product, or a local sales representative. In pharmaceutical litigation against national pharmaceutical companies, trial lawyers also name local drug stores, pharmacists, or doctors as defendants in the complaint. When a national automaker is sued, the local dealership or repair shop that serviced the vehicle may be dragged into court. In insurance coverage disputes, trial lawyers name local claims adjusters even when the adjuster's only role was to assess the damage claimed by the insured.

In many of these situations, the local defendant, which is often an individual or small business, is not subject to liability under applicable state law or has a complete defense under federal law, or the trial lawyer has no intention of actually pursuing a

judgment against the local defendant. But the current legal test for fraudulent joinder is so demanding today—requiring essentially that there be no possibility at all that the local defendant is innocent—that the district court will feel obliged to grant the trial lawyer's motion to bring the case back to state court. Once the case is brought back to state court, however, the local defendant will often be dropped from the case. By that time, the harm is done. Small business owners and other individuals who are named as a defendant for an improper reason are forced to incur substantial financial costs in defending their business. They must dedicate their time and energy to the case and deal with the heavy emotional toll that an unjust lawsuit may cause.

The Fraudulent Joinder Prevention Act would protect innocent local defendants in two main ways. First, the bill allows federal judges greater discretion to release local defendants from a case where it is not plausible to conclude, as a legal matter, that applicable state law would impose liability on the local defendant. The term “plausible” is taken from the Supreme Court’s jurisprudence interpreting Rule 8 of the Federal Rules of Civil Procedure, and the Court’s decisions provide substantial guidance as to the meaning of the term. Initially, in *Bell Atlantic Corp. v. Twombly*,¹⁵¹ the Court distinguished between plausible claims and claims that are speculative: “Factual allegations must be enough to raise a right to relief above the speculative level.”¹⁵² Later, in *Ashcroft v. Iqbal*,¹⁵³ the Court stated: “The plausibility standard . . . asks for more than a sheer possibility that a defendant has acted unlawfully.” This standard “demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation” or “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements.”¹⁵⁴ Professor Martin H. Redish, one of the nation’s foremost scholars of federal court jurisdiction, has written that “the Twombly-Iqbal plausibility standard represents the fairest and most efficient resolution of the conflicting interests” in the context of pleading.¹⁵⁵ It will similarly provide a fair and efficient approach in the context of fraudulent joinder.

Second, the bill codifies a proposition that the Supreme Court has long recognized: that in deciding whether joinder is fraudulent, courts may consider whether the plaintiff has a good-faith intention of seeking a judgment against the local defendant.¹⁵⁶ Consistent with Supreme Court precedent, courts continue to find fraudulent joinder when objective evidence clearly demonstrates there is no good faith intention to prosecute the action against all defendants. As the federal court in *Faulk v. Husqvarna Consumer Outdoor Products N.A., Inc.*¹⁵⁷ said, “Where the plaintiff’s collective litigation actions, viewed objectively, clearly demonstrate a lack of good faith intention to pursue a claim to judgment against a non-diverse [local] defendant, the court should dismiss the non-diverse [local] defendant and retain jurisdiction over the case.” That is what federal courts mean when they describe “objective evidence” in the context of fraudulent joinder, namely “collective litigation actions.” The language of this provision is taken almost verbatim from an often-cited decision of the Third Circuit. In *In re Briscoe*,¹⁵⁸ the court said that joinder is fraudulent if “there is . . . no real intention in good faith to prosecute the action against the defendant or seek a joint judgment.”

The Fraudulent Joinder Prevention Act is the kind of remedy urged by one of the most respected federal judges in the country, Judge J. Harvie Wilkinson of the Fourth Circuit Court of Appeals. Judge Wilkinson has said “That’s exactly the kind of approach [to federal jurisdiction reform] that I like because it’s targeted. And there is a problem with fraudulent jurisdiction law as it exists today, I think, and that is that you have to establish that the joinder of a non-diverse [local] defendant is totally ridiculous and that there’s no possibility of ever recovering . . . [T]hat’s very hard to do. So I think making the fraudulent joinder law a little bit more realistic . . . appeals to me because it seems to me the kind of intermediate step that addresses some real problems.”¹⁵⁹

Task Force Solution: House Republicans will seek the elimination of lawsuits that abusively add innocent businesses or individuals through enactment of the Fraudulent Joinder Prevention Act.

¹⁵¹ 550 U.S. 544 (2007).

¹⁵² *Id.* at 555.

¹⁵³ 556 U.S. 662, 678 (2009).

¹⁵⁴ *Iqbal*, 556 U.S. at 778.

¹⁵⁵ Martin H. Redish, “Pleading, Discovery, and the Federal Rules: Exploring the Foundations of Modern Procedure,” 64 Fla. L. Rev. 845, 850 (2012).

¹⁵⁶ See *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 98 (1921) (“[T]he joinder was a sham and fraudulent—that is, . . . without any purpose to prosecute the cause in good faith against the [defendant]” and “with the purpose of fraudulently defeating the [other defendant’s] right of removal.”).

¹⁵⁷ 849 F.Supp.2d 1327, 1331 (M.D. Ala. 2012).

¹⁵⁸ 448 F.3d 201, 216 (3rd Cir. 2006).

¹⁵⁹ Video of Federal Society National Lawyers Convention panel on “Diversity Jurisdiction from Strawbridge to CAFA” (November 17, 2014), available at <http://www.fed-soc.org/multimedia/detail/diversity-jurisdiction-from-strawbridge-to-cafa-event-video>.

Stem the Tide of ‘Sue-and-Settle’ Regulations

One of the worst regulatory abuses is the manipulation of lawsuits and judicial consent decrees or settlement agreements to “force” regulators to put out new regulations. Regulatory agencies too often welcome these suits and willingly sign up to the resulting decrees and settlements, under which they can more easily issue expensive or controversial new regulations—claiming that “The court made me do it.”

The administration has used sue-and-settle litigation to impose a host of new major regulations, including EPA’s Maximum Achievable Control Technology (MACT) rules for utilities, cement plants, and oil-and-gas drilling, New Source Performance Standards for utilities, oil refiners and oil-and-gas drillers, and many other requirements. This history of this abuse, however, goes back several administrations. While executive branch policies have intermittently intervened to help to curb abuse, that effort has been inconsistent and has never adequately provided for states, localities, individuals and businesses who will bear the costs of newly required regulations to have a fair seat at the table when problem decrees and settlement agreements are negotiated by plaintiffs and regulatory agencies. Similarly, executive branch efforts, when they have been tried, have never adequately assured that courts are in a position to ensure that all requirements of the Administrative Procedure Act and other administrative law statutes and orders are complied with as new regulations are put out under the cloak of decrees and settlements.

All the while, billions of dollars in new regulatory costs have been imposed upon the economy. It is time for Congress to step in and enact legislation to clean up this corner of the law. Although the ultimate decision on whether to enter into any given settlement should be left to high-ranking and accountable executive branch officials such as the attorney general and agency heads, Congress can and should provide for greater transparency and public participation. In addition, Congress can ensure that settlements are entered into and carried out in the public interest rather than as a means to circumvent usual rulemaking procedures or to evade accountability. More fundamentally, though, the source of this problem—and its ultimate solution—lies with Congress. It should recognize that setting governmental priorities is an inherently political process and therefore act to limit the availability of “citizen suits” that seek to spur the government into furthering the litigants’ parochial view of the public good.

Accordingly, House Republicans will continue to seek legislation that reforms the availability of citizen suits.^[1] We will also seek to eliminate the problem of abusive sue-and-settle decrees and settlements, for example, by requiring through H.R. 712 (Rep. Doug Collins), the Sunshine for Regulatory Decrees and Settlements Act:

- greater transparency to the public and Congress of sue-and-settle notices of intent to sue, complaints, decrees, settlements, and attorneys’ fee awards;
- greater rights in sue-and-settle litigation for regulated entities and the public, so that agencies cannot propose decrees and settlements to the courts until parties affected by the proposed regulations can intervene and participate in settlement negotiations, and proposed decrees and settlements cannot be submitted to the court for approval until they are published for public notice and comment;
- greater judicial scrutiny, so that courts weighing proposed decrees and settlements can better assure compliance with normal rulemaking procedures and account for agency needs to also fulfill competing mandatory duties not within the litigation when ordering rulemaking schedules;
- greater accountability for the Department of Justice and defendant agencies, by requiring the Attorney General or agency heads to certify to the court their approval of proposed decrees that convert discretionary rulemaking authorities into mandatory duties; and,
- greater flexibility for new administrations and courts to rein in existing consent decrees, by allowing courts to review de novo motions to modify decrees in light of changed facts and circumstances or competing duties.