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SEARCHING FOR AND CUTTING REGULATIONS THAT ARE UNNECESSARILY BURDENSOME ACT OF 2015

JULY 10, 2015.—Ordered to be printed

Mr. GOODLATTE, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 1155]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 1155) to provide for the establishment of a process for the review of rules and sets of rules, and for other purposes, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

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49–006

Purpose and Summary

H.R. 1155, the "Searching for and Cutting Regulations that are Unnecessarily Burdensome Act of 2015" (SCRUB Act) establishes a blue-ribbon Retrospective Regulatory Review Commission to identify and recommend to Congress for repeal existing Federal regulations that can be eliminated to reduce unnecessary regulatory costs to the U.S. economy. The Commission is charged with reducing these costs without significantly reducing overall regulatory effectiveness, by, for example, identifying and recommending for repeal regulations that have already achieved their purpose and can be repealed without recurrence of the problem they were intended to address, are otherwise outdated, impose disproportionate paperwork burdens, are ineffective or not cost-justified, impede the introduction of newer, safer technologies, or for other specified reasons impose unnecessary regulatory burdens. The bill sets for the Commission a goal of achieving at least a fifteen percent reduction in the cumulative cost of current Federal regulations with a minimal reduction in the overall effectiveness of Federal regulation.

Background and Need for the Legislation

I. GENERAL BACKGROUND

A. Jobs, Growth and the Impact of Federal Regulations

Numerous observers have attributed the economy's slow rates of job creation and growth in part to the burden of Federal regulation and uncertainty over what regulation will come next.[1] According to some estimates, the total Federal regulatory burden has reached at least as high as $1.86 trillion, or in the neighborhood of $15,000 per year for each U.S. household.[2] Americans for Tax Reform estimated in August 2011 that Americans worked an estimated 77 days per year just to cover the cost of the Federal regulatory burden.[3] According to recent Gallup survey results, small-business owners in the United States continue to list government regulation as one of the top challenges they confront.[4]

Notwithstanding that executive orders since the 1980's have required regulatory agencies to clearly identify the problems their regulations are intended to solve, available regulatory alternatives, and the costs and benefits of new regulations, many regulations currently in effect have been ill-considered and not clearly necessary. For example, the Obama administration has regularly failed to analyze both the costs and the benefits of substantial

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[1] *See, e.g.,* Editors, *The Uncertainty Principle,* The Wall Street Journal (July 14, 2010) (available at http://online.wsj.com/article/SB10001424052748704288204575363162664835780.html?KEYWORDS=rulemakings); John B. Taylor, *"John Taylor: Rules for America's Road to Recovery,"* The Wall Street Journal (May 31, 2012) (available at http://online.wsj.com/article/SB10001424052702303674004577434774238817962.html).

[2] *See* Clyde Wayne Crews, Jr., *Ten Thousand Commandments 2014, An Annual Snapshot of the Regulatory State,* at 2 (April 2014) (available at http://cei.org/studies/ten-thousand-commandments-2014); National Association of Manufacturers, *The Cost of Federal Regulation to the U.S. Economy, Manufacturing and Small Business* at 1 (Sept. 10, 2014), *available at* http://www.nam.org/Data-and-Reports/Cost-of-Federal-Regulations/Federal-Regulation-Full-Study.pdf (last accessed January 24, 2015).

[3] Americans for Tax Reform, *2011 Cost of Government Day, August 12* (Aug. 10, 2011), (available at http://www.atr.org/?content=2011COGD).

[4] Gallup Economy, *Small Businesses Face Operational, Regulatory Challenges* (Feb. 28, 2014) (available at http://www.gallup.com/poll/167660/small-businesses-face-operational-regulatory-challenges.aspx).

numbers of major regulations.[5,6] Similarly, in a multi-year study of major regulations, the Mercatus Center found that agencies did a poor job satisfying a host of basic rulemaking quality standards. These included the identification of clear problems requiring regulatory solutions, analysis of adequate alternatives, assessment of costs and benefits, and demonstration that chosen regulations would produce the agencies' desired outcomes.[7] Consistent with these results, there is bipartisan agreement that too many regulations currently in force are defective, and that many of these regulations can be revisited and eliminated or improved.[8]

B. Retrospective Review Efforts by the Executive Branch

The Obama administration has issued three executive orders that in whole or in part call for such retrospective review of existing regulations. First and foremost is Executive Order 13563, issued on January 18, 2011. Among other things, that order calls upon executive agencies to conduct, under the oversight of the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA), a retrospective review of existing, significant regulations to identify which "may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with" the findings of the retrospective review.[9] The order further calls for such review to be conducted periodically thereafter, so that agencies regularly can "determine whether any such regulations should be modified, streamlined, expanded, or repealed so as to make the agency's regulatory program more effective or less burdensome in achieving the regulatory objectives."[10]

Seven months later, on July 7, 2011, President Obama issued another executive order, E.O. 13579, directed at independent agencies, such as the Federal Communications Commission, the Federal Reserve and the Securities Exchange Commission. These agencies fell outside the requirements of E.O. 13563 and prior orders, such as E.O. 12866, due in part to hesitancy by presidents to assert di-

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[5] "Major" regulations generally are those with $100 million or more in effects. *See, e.g.,* Executive Order 12866 at sec. 3(f) (Sept. 30, 1993).

[6] *See* Office of Information and Regulatory Affairs, *2010 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities* at 3 (2010) (available at http://www.whitehouse.gov/sites/default/files/omb/legislative/reports/2010_Benefit_Cost_Report.pdf); Office of Information and Regulatory Affairs, *2011 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities* at 3 (2011) (available at http://www.whitehouse.gov/sites/default/files/omb/inforeg/2011_cb/2011_cba_report.pdf); Office of Information and Regulatory Affairs, *2012 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities* at 3–4 (2012) (available at http://www.whitehouse.gov/sites/default/files/omb/inforeg/2012_cb/2012_cost_benefit_report.pdf); Office of Information and Regulatory Affairs, *2013 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities* at 4 (2014) (available at http://www.whitehouse.gov/sites/default/files/omb/inforeg/2013_cb/2013_cost_benefit_report-updated.pdf).

[7] *See generally* Mercatus Center, *Regulatory Report Card,* available at: http://mercatus.org/reportcard. For a description of the Report Card's methodology, *see* http://mercatus.org/reportcards/methodology.

[8] *See, e.g.,* Executive Order 13563, *Improving Regulation and Regulatory Review,* at sec. 6, 76 Fed. Reg. 3821, 3822 (Jan. 18, 2011) (agencies shall consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned); Pres. Barack Obama, *Toward a 21st Century Regulatory System,* The Wall Street Journal (January 18, 2011) (E.O. 13563 "orders a government-wide review of the rules already on the books to remove outdated regulations that stifle job creation and make our economy less competitive") (available at http://online.wsj.com/article/SB10001424052748703396604576088272112103698.html).

[9] 76 Fed. Reg. at 3822.

[10] *Id.*

rect White House control over independent agencies' regulatory decisions.

In E.O. 13579, the President exhorted independent agencies, like the executive agencies addressed by E.O. 13563, to conduct retrospective analyses of existing significant regulations and to prepare plans under which independent agencies would thereafter periodically conduct similar retrospective reviews to determine whether any such regulations should be modified, streamlined, expanded, or repealed.[11] Unlike executive agencies, independent agencies were not ordered to submit such plans to OIRA, but rather simply to release the plans to the public.[12]

Finally, on May 10, 2012, the President released *Executive Order 13610, "Identifying and Reducing Regulatory Burdens." This order "i*nvites public participation to help agencies determine whether existing regulations remain justified and whether they should be modified or streamlined in light of changed circumstances, including the rise of new technologies."[13] It also "instructs agencies to give priority to initiatives that will produce significant monetary savings or reductions in paperwork burdens while protecting public health, welfare, safety, and the environment."[14] Finally, the order "[r]equires agencies to regularly report to OIRA on retrospective review efforts, including their progress, anticipated accomplishments, and proposed timelines for relevant actions."[15] The first of these reports was due on September 10, 2012. Reports were due thereafter on the second Monday of January and July of each year.

From the outset, these executive orders have produced few meaningful results. For example, the Heritage Foundation's July 25, 2011, mid-year report on growth in Federal regulation reported that, notwithstanding the issuance of E.O. 13563, '[i]n the first 6 months of the 2011 fiscal year . . . [n]o major rulemaking actions were taken to reduce regulatory burdens during this period." From January 2009 to mid-FY 2011, "there were only six major deregulatory actions . . . , with reported savings of just $1.5 billion."[16] The Administration's own preliminary results of the E.O. 13653 review, released in May 2011, suggested that the Administration had identified only about $1 billion a year in potential regulatory burden reductions from the repeal or modification of existing regulations.[17] More recently, in a January 2014 assessment of the Administration's retrospective review effort, the American Action Forum (AAF) determined that "[o]n net, proposed and final rules that have come under this reform have *added* $13.7 billion in new burdens, but counting only regulations that cut costs, the Administration has cut at least $8.7 billion in burdens."[18]

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[11] *Id.*

[12] *Id.*

[13] Office of the Federal Register, *Executive Order 13610 on Public Inspection* (May 10, 2012) (available at https://www.federalregister.gov/blog/2012/05/executive-order-13610-on-public-inspection.

[14] *Id.*

[15] *Id.*

[16] James Gattuso and Diane Katz, *Red Tape Rising: A 2011 Mid-Year Report,* the Heritage Foundation (July 25, 2011*) ("Red Tape Rising Mid-Year Report")* (available at http://www.heritage.org/research/reports/2011/07/red-tape-rising-a-2011-mid-year-report).

[17] *Red Tape Rising Mid-Year Report.*

[18] Sam Batkins, *Three Years of Regulatory Reform: Did the President's Executive Orders Work?,* American Action Forum (Jan. 21, 2014) (emphasis added) (available at http://americanactionforum.org/insights/three-years-of-regulatory-reform-did-the-presidents-executive-orders-work).

In and of itself, a reduction of $8.7 billion in regulatory costs, if it actually occurred, would be a positive development. However, if the net result of activity under the Administration's regulatory reform initiative has been the *addition* of $13.7 billion in regulatory burdens, then it appears that the Administration's effort has failed. Making matters worse, regulatory activity under the current Administration outside of the retrospective review initiative has dwarfed any results of retrospective review. According to AAF, between 2010 and early 2014, the total burden of paperwork hours imposed by Federal regulation had increased by 1.5 billion hours, or 17 percent, and the Obama administration added $488 billion in new regulatory costs between 2009 and 2012.[19] The Heritage Foundation has estimated that new regulatory costs just from major regulations totaled roughly $70 billion during the Administration's first term.[20]

From 2003 to 2006, the George W. Bush administration also engaged in retrospective review of existing regulations. Its aim, like the Obama administration's stated goal, was to identify and modify or rescind regulations that performed suboptimally. Also like the Obama administration, the Bush administration conducted its review under OIRA's oversight and with opportunities for the public to identify problematic regulations. The Bush administration's effort, however, likewise did not produce major results.

There are a number of reasons for which retrospective review efforts to date may not have produced significant results. Regulatory agencies, on the one hand, have strong incentives to focus their resources on prospective regulatory activities that address new problems and congressional mandates. They have much weaker incentives to revisit their past work, examine it, brand it as ineffective or counterproductive, and repeal or amend it. Regulated entities, meanwhile, have strong incentives to focus their resources on the shaping or prevention of new regulations, rather than to focus on the nomination of old regulations that agencies should modify or rescind. Amendment or repeal of existing regulations, for example, can portend the loss of regulated entities' sunk costs in regulatory compliance, whole new sets of compliance costs connected to replacement regulations, and even potentially worse new regulations. Post-hoc attempts by regulated entities to identify old regulations for repeal or amendment can also antagonize regulatory agencies with which these entities must deal on a regular basis.

C. Legislative Background

1. Prior Retrospective Review Proposals during the 112th and 113th Congresses

A number of proposals to require some manner of retrospective regulatory review through legislation have been introduced or advocated over the past several years, both within the Congress and in the broader public. In the House of Representatives during the 112th Congress, for example, Rep. Ben Quayle (R-AZ) introduced

[19] Sam Batkins, *President Obama's $488 Billion Regulatory Burden,* at 3, American Action Forum (Sept. 19, 2012) (available at http://americanactionforum.org/research/president-obamas-488-billion-regulatory-burden).

[20] James Gattuso and Diane Katz, *Red Tape Rising: Regulation in Obama's First Term,* the Heritage Foundation (May 1, 2013) (available at http://www.heritage.org/research/reports/2013/05/red-tape-rising-regulation-in-obamas-first-term).

H.R. 3392, which was cosponsored by several other Members of the Judiciary Committee and required agencies to perform decennial reviews of their existing major rules, determine the regulations' costs and benefits, identify regulatory amendments that would accomplish the same statutory objectives but result in different costs and benefits, and identify the costs and benefits of repealing the existing regulations. Other House bills during the 112th Congress included H.R. 6333, the "Sunset Act of 2012," introduced by Rep. Steve King (R-IA); H.R. 3068, the "Regulatory Sunset and Review Act of 2011," introduced by Rep. Hultgren (R-IL); and, H.R. 213, "Regulation Audit Revive Economy Act of 2011," introduced by Rep. Don Young (R-AK). Rep. King's bill required agencies to designate not less than 10 percent of their eligible rules for review during each of the next 10 years, and terminated any such rule for which Congress did not enact a joint resolution of approval within 10 years after enactment of the bill. Mr. Hultgren's legislation, reintroduced during the 113th Congress as H.R. 309, created a multiyear, structured process for the OIRA Administrator, the public and Members of Congress to identify regulations for review and potential sunsets in light of the regulations' costs and benefits and whether the regulations are obsolete, unnecessary, duplicative, conflicting, or otherwise inconsistent. Mr. Young's bill directed the Office of Management and Budget to review existing regulations and submit to Congress a public report that estimated regulations' annual costs and benefits and offered recommendations for reforms of existing major rules.

Outside of the House, Senator Warner of Virginia proposed during the 112th Congress that agencies be required to rescind existing regulations to provide cost offsets as they promulgate new regulations, a concept that has been pioneered in the United Kingdom and that resembles the House's "cut-go" fiscal control efforts in the legislative sphere.[21] During the 113th Congress, Senators King of Maine and Blunt of Missouri introduced S. 1390, the "Regulatory Improvement Act of 2013," to create a regulatory review commission with authority to retrospectively review a single area of regulations chosen by the review commission and recommend regulations for modification, consolidation or elimination of regulations in the chosen area. On May 9, 2014, Rep. Patrick Murphy introduced a House companion, H.R. 4646, to S. 1390.

Commentators outside of Congress similarly have proposed potential solutions. For example, Michael Mandel, Ph.D., of the Progressive Policy Institute proposed in 2011 the institution of a "Regulatory Improvement Commission," akin to the Base Realignment and Closure Commission established under the Defense Base Closure and Realignment Act of 1990, Pub. L. No. 101–510, to conduct retrospective review and propose blocs of regulations to Congress for rescission.[22]

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[21] Sen. Mark Warner, *Self-Replicating Regulation: How to Trim Government* Overlap, The Atlantic (Mar. 12, 2012) (available at http://www.theatlantic.com/politics/archive/2012/03/self-replicating-regulation-how-to-trim-government-overlap/253898/).

[22] Michael Mandel, Ph.D., *Reviving Jobs and Innovation: A Progressive Approach to Improving Regulation,* Progressive Policy Institute (Feb. 2011) (available at http://progressivepolicy.org/wp-content/uploads/2011/02/2011_Mandel_A-Progressive-Approach-to-Improving-Regulation.pdf).

2. H.R. 4874, the "Searching for and Cutting Regulations that are Unnecessarily Burdensome Act of 2014" (SCRUB Act)

Numerous features of prior retrospective review proposals have been found by the Committee to have merit. To make the most of them and create the most effective overall approach, the original SCRUB Act, H.R. 4874, introduced in the 113th Congress, built several of these features into its architecture, along with innovations of its own. In a nutshell, the SCRUB Act institutes an independent regulatory review commission with authority to identify within the Code of Federal Regulations any regulations or sets of regulations that implement regulatory programs that, under specified criteria, merit repeal to reduce unnecessary regulatory cost burdens. The Commission is empowered to recommend the highest priority repeals for immediate action, and, if a joint congressional resolution of approval is enacted, agencies are required to execute these repeals within 60 days of enactment. All other regulations recommended by the Commission for repeal are placed into an inventory of regulations which the agencies must repeal over time through a "cut-go" process as agencies promulgate new regulations. Under this process, the costs of each new regulation must be offset by cost-reductions associated with the repeal of regulations in the inventory, until each agency completes the repeals of its own regulations specified in the inventory. Agencies are left free to determine the order in which they will execute inventory-based repeals. They also remain free to promulgate new regulations that re-implement statutory authority originally implemented by a regulation in the inventory. If they do so, however, they must assure that repeals of other regulations in the inventory achieve a full offset of the costs of the new regulation. Finally, when the Commission recommends the repeal of a set of rules that implement a regulatory program, the Commission is to provide to Congress an analysis of whether Congress should consider repeal of the underlying statutory authority which the set of regulations implemented.

On June 18, 2014, the Committee ordered H.R. 4874 to be reported favorably to the House without amendment. On July 24, 2014, the Committee on Oversight and Government Reform, which shared jurisdiction over the bill, also ordered H.R. 4874 to be reported favorably to the House, in the form of an amendment in the nature of a substitute (AINS) offered by Mr. Collins. The AINS applied the Federal Advisory Committee Act to the Commission and made a number of other minor revisions to the bill.

H.R. 1155 generally reiterates the terms of H.R. 4874 as ordered to be reported by the Committee on Oversight and Government Reform and adds a small number of additional revisions. Those revisions add new terms to section 101(j) of the bill to assure that agencies, when they re-implement statutory authority on which repealed rules relied, do not promulgate new rules that perpetuate the defects of the repealed rules or result in adverse effects of other kinds described in section 101(h) of the bill. The revisions also convert section 101(k)'s authorization of funding to a simple authorization of appropriations up to $30 million and eliminate no-longer needed section 101(l) of H.R. 4874, which required coordination between the Commission and the Office of Management and Budget regarding no-longer authorized transfers of agency funds.

Hearings

The Subcommittee on Regulatory Reform, Commercial and Antitrust Law held a hearing on H.R. 1155 on March 2, 2015. Testimony was received from: William L. Kovacs, Senior Vice President for Environment, Technology & Regulatory Affairs, the U.S. Chamber of Commerce; Patrick A. McLaughlin, Senior Research Fellow, Mercatus Center, George Mason University; Sam Batkins, Director of Regulatory Policy, American Action Forum; and, Amit Narang, Regulatory Policy Advocate, Public Citizen.

Committee Consideration

On March 24, 2015, the Committee met in open session and ordered the bill H.R. 1155 favorably reported without amendment, by a rollcall vote of 17 to 12, a quorum being present.

Committee Votes

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that the following rollcall votes occurred during the Committee's consideration of H.R. 1155.

1. Amendment #1, offered by Mr. Johnson. The Amendment strikes title II of the bill, eliminating the bill's regulatory "cut-go" provisions. The amendment was defeated by a rollcall vote of 5 to 12.

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman		X	
Mr. Sensenbrenner, Jr. (WI)			
Mr. Smith (TX)			
Mr. Chabot (OH)		X	
Mr. Issa (CA)			
Mr. Forbes (VA)		X	
Mr. King (IA)		X	
Mr. Franks (AZ)		X	
Mr. Gohmert (TX)			
Mr. Jordan (OH)			
Mr. Poe (TX)			
Mr. Chaffetz (UT)			
Mr. Marino (PA)		X	
Mr. Gowdy (SC)			
Mr. Labrador (ID)			
Mr. Farenthold (TX)			
Mr. Collins (GA)		X	
Mr. DeSantis (FL)			
Ms. Walters (CA)		X	
Mr. Buck (CO)		X	
Mr. Ratcliffe (TX)		X	
Mr. Trott (MI)		X	
Mr. Bishop (MI)		X	
Mr. Conyers, Jr. (MI), Ranking Member	X		

ROLLCALL NO. 1—Continued

	Ayes	Nays	Present
Mr. Nadler (NY)			
Ms. Lofgren (CA)			
Ms. Jackson Lee (TX)			
Mr. Cohen (TN)			
Mr. Johnson (GA)	X		
Mr. Pierluisi (PR)			
Ms. Chu (CA)	X		
Mr. Deutch (FL)			
Mr. Gutierrez (IL)			
Ms. Bass (CA)			
Mr. Richmond (LA)			
Ms. DelBene (WA)	X		
Mr. Jeffries (NY)			
Mr. Cicilline (RI)	X		
Mr. Peters (CA)			
Total	5	12	

2. Amendment #2, offered by Ms. DelBene. The Amendment carves out of rules covered by the bill rules made by an agency in response to an emergency. The amendment was defeated by a rollcall vote of 8 to 13.

ROLLCALL NO. 2

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman		X	
Mr. Sensenbrenner, Jr. (WI)			
Mr. Smith (TX)			
Mr. Chabot (OH)		X	
Mr. Issa (CA)			
Mr. Forbes (VA)		X	
Mr. King (IA)		X	
Mr. Franks (AZ)		X	
Mr. Gohmert (TX)		X	
Mr. Jordan (OH)			
Mr. Poe (TX)			
Mr. Chaffetz (UT)			
Mr. Marino (PA)		X	
Mr. Gowdy (SC)			
Mr. Labrador (ID)			
Mr. Farenthold (TX)			
Mr. Collins (GA)		X	
Mr. DeSantis (FL)			
Ms. Walters (CA)		X	
Mr. Buck (CO)		X	
Mr. Ratcliffe (TX)		X	
Mr. Trott (MI)		X	
Mr. Bishop (MI)		X	
Mr. Conyers, Jr. (MI), Ranking Member	X		

ROLLCALL NO. 2—Continued

	Ayes	Nays	Present
Mr. Nadler (NY)			
Ms. Lofgren (CA)	X		
Ms. Jackson Lee (TX)	X		
Mr. Cohen (TN)			
Mr. Johnson (GA)	X		
Mr. Pierluisi (PR)			
Ms. Chu (CA)	X		
Mr. Deutch (FL)			
Mr. Gutierrez (IL)			
Ms. Bass (CA)			
Mr. Richmond (LA)			
Ms. DelBene (WA)	X		
Mr. Jeffries (NY)			
Mr. Cicilline (RI)	X		
Mr. Peters (CA)	X		
Total	8	13	

3. Amendment #3, offered by Mr. Cicilline. The Amendment carves out of rules covered by the bill rules pertaining to consumer safety made by the Commissioner of Food and Drugs, including under the FDA Food Safety Modernization Act. The amendment was defeated by a rollcall vote of 8 to 13.

ROLLCALL NO. 3

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman		X	
Mr. Sensenbrenner, Jr. (WI)			
Mr. Smith (TX)			
Mr. Chabot (OH)		X	
Mr. Issa (CA)			
Mr. Forbes (VA)		X	
Mr. King (IA)		X	
Mr. Franks (AZ)		X	
Mr. Gohmert (TX)		X	
Mr. Jordan (OH)			
Mr. Poe (TX)			
Mr. Chaffetz (UT)			
Mr. Marino (PA)		X	
Mr. Gowdy (SC)			
Mr. Labrador (ID)			
Mr. Farenthold (TX)			
Mr. Collins (GA)		X	
Mr. DeSantis (FL)			
Ms. Walters (CA)		X	
Mr. Buck (CO)		X	
Mr. Ratcliffe (TX)		X	
Mr. Trott (MI)		X	
Mr. Bishop (MI)		X	

ROLLCALL NO. 3—Continued

	Ayes	Nays	Present
Mr. Conyers, Jr. (MI), Ranking Member	X		
Mr. Nadler (NY)			
Ms. Lofgren (CA)	X		
Ms. Jackson Lee (TX)	X		
Mr. Cohen (TN)			
Mr. Johnson (GA)	X		
Mr. Pierluisi (PR)			
Ms. Chu (CA)	X		
Mr. Deutch (FL)			
Mr. Gutierrez (IL)			
Ms. Bass (CA)			
Mr. Richmond (LA)			
Ms. DelBene (WA)	X		
Mr. Jeffries (NY)			
Mr. Cicilline (RI)	X		
Mr. Peters (CA)	X		
Total	8	13	

4. Amendment #4, offered by Ms. Jackson Lee. The Amendment carves out of rules covered by the bill rules made by the Secretary of Homeland Security. The amendment was defeated by a rollcall vote of 8 to 15.

ROLLCALL NO. 4

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman		X	
Mr. Sensenbrenner, Jr. (WI)		X	
Mr. Smith (TX)			
Mr. Chabot (OH)		X	
Mr. Issa (CA)			
Mr. Forbes (VA)			
Mr. King (IA)			
Mr. Franks (AZ)		X	
Mr. Gohmert (TX)		X	
Mr. Jordan (OH)			
Mr. Poe (TX)		X	
Mr. Chaffetz (UT)		X	
Mr. Marino (PA)		X	
Mr. Gowdy (SC)		X	
Mr. Labrador (ID)			
Mr. Farenthold (TX)			
Mr. Collins (GA)		X	
Mr. DeSantis (FL)			
Ms. Walters (CA)		X	
Mr. Buck (CO)		X	
Mr. Ratcliffe (TX)		X	
Mr. Trott (MI)		X	
Mr. Bishop (MI)		X	

ROLLCALL NO. 4—Continued

	Ayes	Nays	Present
Mr. Conyers, Jr. (MI), Ranking Member	X		
Mr. Nadler (NY)	X		
Ms. Lofgren (CA)	X		
Ms. Jackson Lee (TX)	X		
Mr. Cohen (TN)			
Mr. Johnson (GA)	X		
Mr. Pierluisi (PR)			
Ms. Chu (CA)			
Mr. Deutch (FL)			
Mr. Gutierrez (IL)			
Ms. Bass (CA)			
Mr. Richmond (LA)			
Ms. DelBene (WA)	X		
Mr. Jeffries (NY)	X		
Mr. Cicilline (RI)	X		
Mr. Peters (CA)			
Total	8	15	

5. Amendment #5, offered by Mr. Cicilline. The Amendment carves out of rules covered by the bill rules made by the Secretary of Veterans Affairs. The amendment was defeated by a rollcall vote of 9 to 17.

ROLLCALL NO. 5

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman		X	
Mr. Sensenbrenner, Jr. (WI)		X	
Mr. Smith (TX)			
Mr. Chabot (OH)		X	
Mr. Issa (CA)			
Mr. Forbes (VA)			
Mr. King (IA)		X	
Mr. Franks (AZ)		X	
Mr. Gohmert (TX)		X	
Mr. Jordan (OH)			
Mr. Poe (TX)		X	
Mr. Chaffetz (UT)		X	
Mr. Marino (PA)		X	
Mr. Gowdy (SC)		X	
Mr. Labrador (ID)		X	
Mr. Farenthold (TX)			
Mr. Collins (GA)		X	
Mr. DeSantis (FL)			
Ms. Walters (CA)		X	
Mr. Buck (CO)		X	
Mr. Ratcliffe (TX)		X	
Mr. Trott (MI)		X	
Mr. Bishop (MI)		X	

ROLLCALL NO. 5—Continued

	Ayes	Nays	Present
Mr. Conyers, Jr. (MI), Ranking Member	X		
Mr. Nadler (NY)	X		
Ms. Lofgren (CA)	X		
Ms. Jackson Lee (TX)	X		
Mr. Cohen (TN)			
Mr. Johnson (GA)	X		
Mr. Pierluisi (PR)	X		
Ms. Chu (CA)			
Mr. Deutch (FL)			
Mr. Gutierrez (IL)			
Ms. Bass (CA)			
Mr. Richmond (LA)			
Ms. DelBene (WA)	X		
Mr. Jeffries (NY)	X		
Mr. Cicilline (RI)	X		
Mr. Peters (CA)			
Total	9	17	

6. Reporting H.R. 1155. The bill establishes a blue-ribbon Retrospective Regulatory Review Commission to identify and recommend to Congress for repeal existing Federal regulations that can be eliminated to reduce unnecessary regulatory costs to the U.S. economy. Reported by a rollcall vote of 17 to 12.

ROLLCALL NO. 6

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman	X		
Mr. Sensenbrenner, Jr. (WI)	X		
Mr. Smith (TX)			
Mr. Chabot (OH)	X		
Mr. Issa (CA)			
Mr. Forbes (VA)			
Mr. King (IA)	X		
Mr. Franks (AZ)	X		
Mr. Gohmert (TX)	X		
Mr. Jordan (OH)			
Mr. Poe (TX)	X		
Mr. Chaffetz (UT)	X		
Mr. Marino (PA)	X		
Mr. Gowdy (SC)	X		
Mr. Labrador (ID)	X		
Mr. Farenthold (TX)			
Mr. Collins (GA)	X		
Mr. DeSantis (FL)			
Ms. Walters (CA)	X		
Mr. Buck (CO)	X		
Mr. Ratcliffe (TX)	X		
Mr. Trott (MI)	X		
Mr. Bishop (MI)	X		

ROLLCALL NO. 6—Continued

	Ayes	Nays	Present
Mr. Conyers, Jr. (MI), Ranking Member		X	
Mr. Nadler (NY)		X	
Ms. Lofgren (CA)		X	
Ms. Jackson Lee (TX)		X	
Mr. Cohen (TN)		X	
Mr. Johnson (GA)		X	
Mr. Pierluisi (PR)		X	
Ms. Chu (CA)		X	
Mr. Deutch (FL)		X	
Mr. Gutierrez (IL)			
Ms. Bass (CA)			
Mr. Richmond (LA)			
Ms. DelBene (WA)		X	
Mr. Jeffries (NY)		X	
Mr. Cicilline (RI)		X	
Mr. Peters (CA)			
Total	17	12	

Committee Oversight Findings

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

New Budget Authority and Tax Expenditures

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

Congressional Budget Office Cost Estimate

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 1155, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, May 8, 2015.

Hon. BOB GOODLATTE, CHAIRMAN,
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 1155, the "SCRUB Act of 2015."

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Matthew Pickford, who can be reached at 226–2860.

Sincerely,

KEITH HALL,
DIRECTOR.

Enclosure

cc: Honorable John Conyers, Jr.
Ranking Member

H.R. 1155—SCRUB Act of 2015.

As ordered reported by the House Committee on the Judiciary on March 24, 2015.

SUMMARY

H.R. 1155 would establish a commission to review existing Federal regulations and identify those that should be repealed to reduce the cost of regulations on the economy. In addition, the legislation would require agencies to review all regulations within 10 years. Finally, H.R. 1155 would authorize the appropriation of up to $30 million to fund the commission.

CBO estimates that, assuming appropriation of the specified amounts, implementing H.R. 1155 would cost $30 million over the 2016–2020 period to operate the commission. Because any changes to current regulations would be subject to future congressional action, CBO estimates that enacting the bill would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

H.R. 1155 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, or tribal governments.

ESTIMATED COST TO THE FEDERAL GOVERNMENT

The estimated budgetary effect of H.R. 1155 is shown in the following table. The costs of this legislation fall within function 800 (general government) and all budget functions that include funding for agencies that issue regulations.

By Fiscal Year, in Millions of Dollars

	2016	2017	2018	2019	2020	2016–2020
CHANGES IN SPENDING SUBJECT TO APPROPRIATION						
Estimated Authorization Level	30	0	0	0	0	30
Estimated Outlays	6	6	6	6	6	30

BASIS OF ESTIMATE

For this estimate, CBO assumes that the bill will be enacted by the end of fiscal year 2015.

ESTIMATED COST TO THE FEDERAL GOVERNMENT

Title I would establish a commission to review the Code of Federal Regulations to determine if a rule or set of rules should be repealed to lower the cost of regulations on the U.S. economy. The commission would recommend to the Congress a list of rules to be repealed. Under the bill, no existing regulations could be repealed unless subsequent legislation to authorize the repeal was enacted. The commission would consist of 9 members appointed by the President and confirmed by the Senate. Members would be paid and reimbursed for travel expenses. In addition, the commission could hire staff. The commission would end after either 5 years and 180 days of enactment or 5 years after all commissioner terms have commenced, whichever is later. H.R. 1155 also would direct the commission to produce annual and final reports on its activities and would authorize the appropriation of up to $30 million to cover the costs of the commission. Assuming appropriation of those amounts, CBO estimates that implementing this title would cost $30 million over the 2015–2020 period.

Under title II, Federal agencies would be directed to offset the estimated costs on the economy of any new regulations by repealing regulations that have been recommended for repeal by the commission; the repeal of such regulations, however, would require enactment of future legislation. How agencies could comply with this requirement to offset the costs of new regulations—without enactment of a law to repeal existing regulations—is unclear. Whether the implementation of new rules would be delayed or postponed under this provision of H.R. 1155 is also unknown. Consequently, CBO has not estimated any budgetary effects of implementing title II.

PAY-AS-YOU-GO CONSIDERATIONS:

None.

INTERGOVERNMENTAL AND PRIVATE-SECTOR IMPACT

H.R. 1155 contains no intergovernmental or private-sector mandates as defined in UMRA and would impose no costs on state, local, or tribal governments.

ESTIMATE PREPARED BY:

Federal Costs: Matthew Pickford
Impact on State, Local, and Tribal Governments: Paige Piper/Bach
Impact on the Private-Sector: Jon Sperl

ESTIMATE APPROVED BY:

Theresa Gullo
Assistant Director for Budget Analysis

Duplication of Federal Programs

No provision of H.R. 1155 establishes or reauthorizes a program of the Federal Government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

Disclosure of Directed Rule Makings

The Committee estimates that H.R. 1155 specifically directs to be completed no specific rule makings within the meaning of 5 U.S.C. 551.

Performance Goals and Objectives

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 1155 is designed to assure the identification and repeal of existing Federal regulations that can be eliminated to reduce unnecessary regulatory costs to the U.S. economy, without significantly reducing overall regulatory effectiveness, and with a goal of reducing by at least 15 percent the cumulative cost burden imposed by Federal regulation.

Advisory on Earmarks

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 1155 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(e), 9(f), or 9(g) of Rule XXI.

Section-by-Section Analysis

The following discussion describes the bill as reported by the Committee.

Sec. 1. Short title. Section 1 sets forth the short title of the bill as the "Searching for and Cutting Regulations that are Unnecessarily Burdensome Act of 2015" or as the "SCRUB Act of 2015."

Sec. 2. Table of Contents; Titles I-V.

Title I—Retrospective Regulatory Review Commission

Sec. 101. In General.

Subsec. (a) establishes the Retrospective Regulatory Review Commission, to review rules to be repealed to reduce costs to the economy and establishes a termination date that is 5 and a half years after enactment of the legislation.

Subsec. (b) establishes the membership of the Commission as 9 members appointed by the President and confirmed by the Senate, selected from lists of recommendations from Leadership in both Houses.

Subsec. (c) defines the power and authority of the Commission to hold meetings, hold public hearings, access information, and issue subpoenas for information and witnesses.

Subsecs. (d) through *(g)* set the rate of pay and travel expenses, provide for a Director of the Commission, and provide for staff and hiring authority.

Subsec. (h):

- directs the Commission to review regulations to identify regulations to repeal, giving priority to older major rules, with a goal of reducing cumulative costs of Federal regulation by 15%;
- establishes criteria by which the Commission will review regulations, including: whether purpose was achieved and rule could be repealed without recurrence, whether costs are not justified by the benefits produced by the expenditure, whether rule rendered unnecessary or obsolete, whether ineffective at achieving rule's purpose, if compliance costs are excessive or otherwise excessively burdensome as compared to alternatives, whether rules inhibit innovation or growth, whether the rule harms competition, and other criteria to eliminate or reduce unnecessarily burdensome costs;
- requires the Commission to establish a methodology to conduct the review and publish the terms in the Federal Register and on an Internet website of the Commission; and,
- requires the Commission to classify identified regulations as either recommending immediate repeal or recommending eligible for repeal through regulatory cut-go procedures; also requires a majority vote for identifying and classifying rules.

Subsec. (i) requires the Commission to submit notices of meetings or hearings, reports at the conclusion of meetings, and annual reports to Congress.

Subsec. (j) provides for Congressional consideration of the Commission's recommendations, requires agencies to repeal regulations in accordance with the recommendations upon enactment of a joint resolution approving of the recommendations, precludes agencies from reissuing rules substantially similar to rules repealed under the Act, and requires agencies to ensure that new rules to re-implement statutory authority that underlay repealed rules will not result in adverse effects of the kinds specified in or under subsec. 101(h).

Subsec. (k) authorizes funding for the Commission of up to $30 million.

Subsec. (l) requires the Committee to establish a website to publish information about the Commission and Commission hearings and meetings, and requires comments and submissions to the Commission be published to the website.

Subsec. (m) clarifies that the Federal Advisory Committee Act applies to the Commission and any subcommittees of the Commission.

Title II—Regulatory Cut-Go

Sec. 201. Cut-Go Procedures.

Requires agencies to repeal a Commission identified rule with equal to or greater than costs to the economy when issuing a new rule. Allows agencies to repeal rules prior to promulgating new regulations to apply the cost savings to new rules promulgated at a later time.

Sec. 202. Applicability.

Establishes that secs. 201 and 203 are applicable to an agency until the agency has repealed all regulations required to be repealed under the Act.

Sec. 203. OIRA Certification of Cost Calculations.

Requires the Administrator of the Office of Information and Regulatory Affairs to review and certify agency determinations of costs of new rules under section 201.

Title III—Retrospective Review of Rules

Sec. 301. Plan for Future Review.

Requires that agencies, when they promulgate new rules, include plans for at least decennial retrospective review of the rules, and requires retrospective reviews for major rules to be substantially similar to the review process set forth in section 101(h).

Title IV—Judicial Review

Sec. 401. Judicial Review.

Subjects to judicial review an agency's compliance with the Act's repeal provisions, cut-go requirements, and requirements for retrospective review plans for new rules.

Title V—Miscellaneous Provisions

Sec. 501. Definitions

Sets forth definitions of terms in the Act.

Sec. 502. Effective Date

Provides that the Act and amendments made by the Act shall take effect beginning on the date of enactment.

Committee Jurisdiction Letters

JASON CHAFFETZ, UTAH
CHAIRMAN

ONE HUNDRED FOURTEENTH CONGRESS

ELIJAH E. CUMMINGS, MARYLAND
RANKING MINORITY MEMBER

Congress of the United States
House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
2157 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515–6143
MAJORITY (202) 225–5074
MINORITY (202) 225–5051
http://oversight.house.gov

May 19, 2015

The Honorable Bob Goodlatte
Chairman
Committee on the Judiciary
2138 Rayburn House Office Building
Washington, DC 20515

Dear Mr. Chairman:

I write concerning H.R. 1155, the Searching for and Cutting Regulations that are Unnecessarily Burdensome (SCRUB) Act of 2015. As you know, the Committee on Oversight and Government Reform received an original referral and the Committee on the Judiciary a secondary referral when the bill was introduced on February 27, 2015. I recognize and appreciate your desire to bring this legislation before the House of Representatives in an expeditious manner, and accordingly, the Committee on Oversight and Government Reform will forego action on the bill.

The Committee takes this action with our mutual understanding that by foregoing consideration of H.R. 1155 at this time, we do not waive any jurisdiction over the subject matter contained in this or similar legislation. Further, I request your support for the appointment of conferees from the Committee on Oversight and Government Reform during any House-Senate conference convened on this or related legislation.

Finally, I would ask that a copy of our exchange of letters on this matter be included in the bill report filed by the Committee on the Judiciary, as well as in the *Congressional Record* during floor consideration, to memorialize our understanding.

Sincerely,

Jason Chaffetz
Chairman

cc: The Honorable John A. Boehner, Speaker
The Honorable Elijah E. Cummings
The Honorable John Conyers, Jr.
The Honorable Thomas J. Wickham, Parliamentarian

BOB GOODLATTE, Virginia
CHAIRMAN

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MIKE BISHOP, Michigan

ONE HUNDRED FOURTEENTH CONGRESS

Congress of the United States
House of Representatives

COMMITTEE ON THE JUDICIARY

2138 RAYBURN HOUSE OFFICE BUILDING

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RANKING MEMBER

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HAKEEM S. JEFFRIES, New York
DAVID CICILLINE, Rhode Island
SCOTT PETERS, California

May 19, 2015

The Honorable Jason Chaffetz
Chairman
Committee on Oversight and Government Reform
2157 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Chaffetz,

Thank you for your letter regarding H.R. 1155, the "Searching for and Cutting Regulations that are Unnecessarily Burdensome Act of 2015." As you noted, the Committee on Oversight and Government Reform was granted the primary referral on the bill.

I am most appreciative of your decision to forego formal action on H.R. 1155 so that it may proceed expeditiously to the House floor. I acknowledge that although you waived formal consideration of the bill, the Committee on the Oversight and Government Reform is in no way waiving its jurisdiction over the subject matter contained in those provisions of the bill that fall within your Rule X jurisdiction. I would support your effort to seek appointment of an appropriate number of conferees on any House-Senate conference involving this legislation.

I will include a copy of our letters in the Committee's report on H.R. 1155 and in the *Congressional Record* during floor consideration of H.R. 1155.

Sincerely,

Bob Goodlatte
Chairman

cc: The Honorable John Boehner, Speaker
The Honorable John Conyers
The Honorable Elijah Cummings
Thomas J. Wickham, Jr., Parliamentarian

Dissenting Views

INTRODUCTION

H.R. 1155, the "Searching for and Cutting Regulations that are Unnecessarily Burdensome (SCRUB) Act of 2015," would establish a "Retrospective Regulatory Review Commission" charged with assessing the economic costs of all agency rules, informal interpretive rules, general statements of policy, rules of agency organization and procedure, informal guidance documents, and memoranda. The Commission's assessment would prioritize corporate profits over public health and safety, ignoring the many benefits and protections that agency rules provide.

Further yet, title II of the bill would establish a regulatory "cut-go" process that would operate as a one-way ratchet, forcing agencies to prioritize between existing protections and responding to new threats to our health and safety. Regulatory cut-go would prohibit *any* regulatory agency from issuing *any* new rule or informal statement, even in the case of an emergency or imminent harm to public health, until the agency first offsets the costs of that new rule or guidance by repealing an existing rule specified by the Commission. This requirement would endanger public health and safety and unnecessarily delay Federal rulemaking by years, wasting untold taxpayer dollars and agency resources.

The SCRUB Act is a dangerous solution in search of a problem. Each branch of government already conducts effective oversight through retrospective review of agency rules, narrowing the delegations of authority to agencies, controlling agency appropriations, and conducting oversight of agency activity. Congress also has the specific authority under the Congressional Review Act to disapprove any rule that an agency proposes.[1] Overlooking this array of options that would provide the necessary scalpel for smart regulatory cuts, the SCRUB Act's meat-cleaver approach is yet another dangerous and unbalanced attempt to derail agencies' missions to protect the public health and safety. Rather than creating jobs, growing the economy, or making Americans safer, these dangerous procedures would tie agencies' hands with unnecessary red-tape and waste valuable agency resources and taxpayer dollars.

In recognition of these concerns, the Coalition for Sensible Safeguards—an alliance of more than 150 consumer, labor, research, faith, and other public interest groups—strongly opposes this legislation, stating that it would likely lead to the repeal of "critical health, safety, and environmental safeguards, even *when the benefits of these rules are significant, appreciated by the public, and far outweigh the costs.*"[2]

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[1] 5 U.S.C. § 801(b) (2015).

[2] Letter to Rep. Bob Goodlatte (R-VA), Chair, & Rep. John Conyers, Jr. (D-MI), Ranking Member, H. Committee on the Judiciary from the Coalition for Sensible Safeguards (Mar. 20, 2015) (original emphasis) (on file with the H. Committee on the Judiciary, Democratic Staff). Current members of the Coalition include: AFL–CIO; Alliance for Justice; American Association of University Professors; American Federation of State, County and Municipal Employees; American Federation of Teachers Americans for Financial Reform; American Lung Association; American Rivers; American Values Campaign; American Sustainable Business Council; BlueGreen Alliance; Campaign for Contract Agriculture Reform; Center for Effective Government; Center for Digital Democracy; Center for Food Safety; Center for Foodborne Illness Research & Prevention; Center for Independent Living; Center for Science in the Public Interest; Citizens for Sludge-Free Land; Clean Air Watch; Clean Water Network; Consortium for Citizens with Disabilities; Consumer Federation of America; Consumers Union; CounterCorp; Cumberland Countians for Peace & Justice; Demos; Economic Policy Institute; Edmonds Institute; Environment America;

For the foregoing reasons, and those discussed more fully below, we respectfully dissent and urge opposition to H.R. 1155.

DESCRIPTION

A brief summary of H.R. 1155's provisions within the Committee's jurisdiction is presented here and a more detailed section-by-section explanation of the bill appears at the end of these views.

Although Title I of H.R. 1155 is not within the jurisdiction of our Committee, an explanation of this provision is necessary to place the remainder of the bill in proper perspective. Section 101 establishes a Retrospective Regulatory Review Commission to review rules to determine whether they should be repealed to eliminate or reduce the costs of regulation to the economy. The Commission would be composed of nine members appointed by the President and confirmed by the Senate. Title I funds the Retrospective Review Commission for an amount not to exceed $30 million.[3]

Title I of the SCRUB Act would empower the Commission to conduct its review of all formal and informal rules through its own methodology, which must be published in the Federal Register and on the Commission's website. Although the bill would require that the Commission prioritize major rules in its review, this review would also include any rules that have been in effect for over 15 years, impose paperwork burdens, or impose disproportionately high costs on small businesses, or could be strengthened in their effectiveness while reducing regulatory costs.

The scope of the mandated review would encompass any "rule" defined in section 551 of the Administrative Procedure Act,[4] which applies to both legislative rules and non-legislative rules. Importantly, non-legislative rules would otherwise be exempt from the APA's notice-and-comment requirements.[5] The Commission must set a goal of reducing 15% of the cumulative cost of Federal regulation with a minimal reduction in the overall effectiveness of such regulation.

Title II of H.R. 1155 would establish a regulatory "cut-go" process, requiring agencies to offset the cost of any new rule by elimi-

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Farmworker Justice; Free Press; Friends of the Earth; Green for All; Health Care for America Now; In the Public Interest; International Brotherhood of Teamsters; International Center for Technology Assessment; International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW); League of Conservation Voters; Los Angeles Alliance for a New Economy; Main Street Alliance; National Association of Consumer Advocates; National Center for Healthy Housing; National Consumers League; National Council for Occupational Safety and Health; National Employment Law Project; National Lawyers Guild, Louisville Chapter; National Women's Health Network; National Women's Law Center; Natural Resources Defense Council; Network for Environmental & Economic Responsibility of United Church of Christ; New Jersey Work Environment Council; New York Committee for Occupational Safety and Health; Oregon PeaceWorks; People for the American Way; Protect All Children's Environment; Public Citizen; Reproductive Health Technologies Project; Safe Tables Our Priority; Sierra Club; Service Employees International Union; Southern Illinois Committee for Occupational Safety and Health; The Arc of the United States; The Partnership for Working Families; Trust for America's Health; U.S. Chamber Watch; U.S. PIRG; Union of Concerned Scientists; Union Plus; United Food and Commercial Workers Union; United Steelworkers; Waterkeeper Alliance; and Worksafe. COALITION FOR SENSIBLE SAFEGUARDS—OUR MEMBERS, http://sensiblesafeguards.org/our-members.

[3] In the previous version of the bill reported favorably by the Committee last Congress, the SCRUB Act allocated the greater of 1% of all unobligated funds of regulatory agencies or $25 million, endowing at least $4.3 billion to the Commission's budget. *See* H.R. 4874, 113th Cong. 101(k) (2014).

[4] 5 U.S.C. §§ 551–59, 701–06, 1305, 3105, 3344, 5372, 7521 (2015). The APA defines a "rule" as "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency." 5 U.S.C. § 551(4) (2015).

[5] 5 U.S.C. § 553(b)(3)(A) (2015).

nating a rule identified by the Commission after the enactment of a joint resolution by Congress approving the recommendations of the Commission's report. Alternatively, an agency may elect to repeal rules identified by the Commission in anticipation of promulgating a new rule, so long as it results in a net reduction in costs imposed by the agency's new rule. Once an agency has repealed all the rules identified by the Commission, that agency is no longer subject to regulatory cut-go.

The SCRUB Act would create two oversight mechanisms for the regulatory cut-go process. First, agency compliance with the SCRUB Act's cut-go process is subject to judicial review under Title IV of the bill. Second, section 203 would require the Administrator of the Office of Information and Regulatory Administration (OIRA) to oversee each agency's calculations of costs associated with new rules. OIRA would be required to review and certify the costs of each new legislative and non-legislative rule. Section 203 would further require agencies to include this review in the administrative record of each rulemaking.

BACKGROUND

Federal regulations impact nearly every aspect of our lives and are "one of the basic tools of government used to implement public policy."[6] The Congressional Research Service observes:

> Agencies issue thousands of rules and regulations each year to implement statutes enacted by Congress. The public policy goals and benefits of regulations include, among other things, ensuring that workplaces, air travel, foods, and drugs are safe; that the nation's air, water and land are not polluted; and that the appropriate amount of taxes is collected. The costs of these regulations are estimated to be in the hundreds of billions of dollars, and the benefits estimates are even higher.[7]

The Administrative Procedure Act (APA),[8] enacted in 1946, establishes the minimum rulemaking[9] and formal adjudication requirements for all administrative agencies. The APA's baseline procedural requirements are designed to maintain a balance between this type of agency flexibility and the requirements of due process. As 84 leading administrative law academics have observed, "The APA has served for nearly 70 years as a kind of Constitution for administrative agencies and the affected public—flexible enough to accommodate the variety of agencies operating under it and the changes in modern life."[10]

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[6] CURTIS W. COPELAND, CONG. RESEARCH SERV., RL 32240, THE FEDERAL RULEMAKING PROCESS: AN OVERVIEW 1 (2005).

[7] *Regulatory Reform: Are Regulations Hindering Our Competitiveness?: Hearing Before the Subcomm. on Regulatory Affairs of the H. Comm. on Gov't Reform,* 109th Cong. (2005) (testimony of J. Christopher Mihm, Managing Director, Strategic Issues, U.S. Government Accountability Office).

[8] 5 U.S.C. §§ 551–59, 701–06, 1305, 3105, 3344, 5372, 7521 (2015).

[9] The APA defines "rulemaking" as the "agency process for formulating, amending or repealing a rule." 5 U.S.C. § 551(5) (2015). A "rule," in turn, is defined as "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency." 5 U.S.C. § 551(4) (2015).

[10] Letter from 84 administrative law academics to H. Judiciary Comm. Chair Bob Goodlatte (R-VA) and H. Judiciary Comm. Ranking Member John Conyers, Jr. (D-MI), 2 (Jan. 12, 2015) (on file with the H. Comm. on the Judiciary, Democratic staff).

In general, proposed rules go through an extensive vetting process that many believe is already too ossified.[11] In addition to the APA, numerous other procedural and analytical requirements have been imposed on the rulemaking process by Congress and various presidents.[12] These requirements focus "predominately on agencies' development of new rules," according to the Government Accountability Office (GAO).[13]

In addition to assessing rules before they go into effect, agencies are often required to review their regulations retrospectively to determine whether any should be revoked or modified. Some reviews are conducted in response to legislative mandate, at the discretion of the agency,[14] or as required by executive order.[15]

CONCERNS WITH H.R. 1155

The SCRUB Act would establish a Commission charged with a redundant and unbalanced mandate that prioritizes economic costs of rules with little to no consideration of the benefits and protections that these rules provide for the health, safety, and well-being of the public and environment. Title II of the bill would further require that agencies offset the cost of new rules through a regulatory "cut-go" process for every new agency rule. Relying on the faulty premise that regulations undermine economic growth and job creation, regulatory cut-go would force agencies to offset the costs of *any* new rule, informal guidance document, or memoranda by repealing an existing rule identified by the Commission. This additional layer of red-tape would require a new rulemaking process for each rule eliminated, forcing agencies to wastefully calculate the cost of any agency action, including issuing informal memoranda. The result of this misguided legislation would be years of delays in the rulemaking process, an unprecedented burden on agencies and taxpayers, and a dangerous threat to the agencies' missions to protect the public health and safety from imminent harm.

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[11] *See, e.g.,* Richard J. Pierce, Jr., *Rulemaking Ossification Is Real: A Response to Testing the Ossificiation Thesis,* 80 GEO. WASH. L. REV. 1493 (2012); *Hearing on H.R. 348, the "Responsibly And Professionally Invigorating Development Act of 2015" (RAPID Act); H.R. 712, the "Sunshine for Regulatory Decrees and Settlements Act of 2015;" and, H.R. 1155, the "Searching for and Cutting Regulations that are Unnecessarily Burdensome Act of 2015" (SCRUB Act) Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary,* 114th Cong. 1, 4–5 (2015) (statement of Amit Narang, Regulatory Policy Advocate, Public Citizen), http://judiciary.house.gov/_cache/files/cfc2a8c6-729e-4e77-9f9f-561f60f1c153/narang-testimony.pdf [hereinafter H.R. 1155 Hearing].

[12] Examples of legislative mandates include the Unfunded Mandates Reform Act, Pub. L. No. 104–4 (1995); the Regulatory Flexibility Act, Pub. L. No. 96–354, 94 Stat. 1164, 1169 (1980); and the Congressional Review Act, Pub. L. No. 104–121 (1996). In addition, both Republican and Democratic Presidents have issued executive orders mandating additional procedural and analytical requirements for Federal rulemakings. *See, e.g.,* Exec. Ord. 12,866, 58 Fed. Reg. 190 (Sept. 30, 1993) (outlining requirements for cost-benefit analysis and review by the Office of Information and Regulatory Affairs for significant rules issued by executive branch agencies).

[13] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO–07–791, REEXAMINING REGULATIONS: OPPORTUNITIES EXIST TO IMPROVE EFFECTIVENESS AND TRANSPARENCY OF RETROSPECTIVE REVIEWS 1 (2007) [hereinafter GAO REPORT].

[14] *Id.* at 5.

[15] For a more extensive discussion of statutes and executive orders requiring retrospective review, *see* discussion *infra* Part III.B.

I. REGULATORY CUT-GO WOULD IMPOSE BURDENSOME AND UNNECESSARY REQUIREMENTS THAT WOULD STALL OR PREVENT AGENCY ACTION

Title II of the SCRUB Act would prohibit any regulatory agency from issuing any new rule, including non-legislative and procedural rules, until the agency first offsets the costs of the new rule by eliminating an existing rule identified by the Commission.[16] This process, also known as regulatory cut-go, would present a dangerous false choice to agencies, cause years of delays in the rulemaking process, and create additional burdens due to its implementation problems. As administrative law experts Sidney Shapiro and Richard Murphy argue, regulatory cut-go is "so fundamentally flawed that it cannot be regarded as a serious policy proposal," but instead is "a political stunt designed to appeal to the anti-regulatory reflexes of corporate interests that find regulation costly and of people who subscribe to the ideological belief that government is always the problem and never the solution."[17]

A. Regulatory Cut-Go Would Require Agencies to Estimate the Cost of Virtually Every New Action

The SCRUB Act would require agencies to calculate the costs of any new "rule," which includes practically any agency action or communication, to determine whether the rule triggers the bill's regulatory cut-go provisions.[18] The bill defines "rule" through reference to section 551 of the APA.[19] This definition is so broad that it applies to virtually any agency action, including (1) legislative rules that bind regulated entities; (2) non-legislative rules, such as general statements of policy such as a press release, speech, memorandum, statements, and informal guidance document;[20] and (3) rules of agency organization, procedure and practice, which courts have defined as technical regulations to prescribe order and formality in business transactions.[21] The practical impact of this sweeping requirement would be nothing short of disastrous, as Professor Ronald Levin argued in his testimony on the bill:

> [E]ven if the Title II process were justified in principle, the unwieldiness of the process would counsel against adopting it. The challenges an agency would face in implementing it would be daunting. The process would require the agency to quantify the costs of every new rule, no matter how trivial the rule might be. This is a substantial departure from current practice. . . . The SCRUB Act . . . goes much further by requiring the same procedure for *every* rule, not just every major rule. I have to assume that the subcommittee did not give sufficient thought to this mani-

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[16] H.R. 1155, 114th Cong. 201 (2015).

[17] Sidney A. Shapiro *et al., Regulatory 'Pay Go': Rationing the Public Interest,* CTR. FOR PROGRESSIVE REFORM ISSUE ALERT #1214 1 (Oct. 2012), http://progressivereform.org/articles/Regulatory_Pay-Go_1214.pdf [hereinafter Shapiro].

[18] H.R. 1155, 114th Cong. 203 (2015) ("The Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget shall review and certify the accuracy of agency determinations of the costs of new rules under section 201.")

[19] 5 U.S.C. § 551 (2015).

[20] 5 U.S.C. § 553(b)(3)(A) (2015); William Funk, *A Primer on Nonlegislative Rules,* 53 ADMIN. L. REV. 1321, 1322 (2001) ("These rules are often called nonlegislative rules, because they are not 'law' in the way that statutes and substantive rules that have gone through notice and comment are 'law,' in the sense of creating legal obligations on private parties.").

[21] Pickus v. United States Board of Parole, 507 F.2d 1107, 1113–14 (D.C. Cir. 1974).

> festly extravagant requirement. Could the sponsors really mean to require an agency to prepare a plan for decennial review of rules that would have such minor impact that they would even be exempted from notice and comment requirements? Rules that would have no compliance costs at all, because they are instituted to distribute benefits rather than to impose burdens? Rules that are designed to address a short-term situation, so that they will not even exist 10 years after they are promulgated? Rules of particular applicability, such as decisions approving corporate reorganizations? [This section] is stunningly overbroad, but I am not going to recommend that it be trimmed back to encompass major rules, because even with that limitation it should be eliminated from the bill.[22]

Due to its practically limitless scope, this cost-assessment requirement would likely deter agencies from proactively clarifying matters of law or policy through non-legislative and procedural rules. Agency personnel routinely rely on non-legislative rules to inform the public and to maintain the consistent applications of statutes and regulations within agencies.[23] These rules are routine and serve a variety of critical functions, such as assuring the uniform application of a statute or regulation and informing the public of an agency's practice and views.[24] For instance, David Cohen, the Under Secretary for Terrorism and Financial Intelligence at the U.S. Department of the Treasury, delivered remarks in March 2014 to clarify the risks involved with virtual currency such as Bitcoin, which is an emerging topic in the field.[25] These remarks, which described prior enforcement actions by the agency and agency guidance in the area of virtual currency, would not be considered a "meeting" within the meaning of section 553 of the APA.[26] However, these remarks would still be within the SCRUB Act's definition of a rule, thereby triggering the SCRUB Act's cost-assessment requirement. In another example, the Food and Drug Administration (FDA) regularly issues informal guidance on routine matters to inform the public of its practices, such as its recent guidance on the FDA's voting procedures for advisory committee meetings.[27] The FDA also issues guidance to ensure the uniform application of statutes, such as when it recently issued informal guidance on the

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[22] *Searching for and Cutting Regulations that are Unnecessarily Burdensome (SCRUB) Act of 2014: Hearing Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary,* 113th Cong. 9, 11 (2014) (statement of Ronald M. Levin, Professor of Law, Washington University School of Law), http://judiciary.house.gov/ cache/files/ 61953df7-cc3f-486a-bb27-71a8d2be42c0/levin-scrub-act-testimony.pdf [hereinafter H.R. 4874 Hearing].

[23] Sam Kalen, *Guidance Documents and the Courts, in* 57 ROCKY MOUNTAIN MINERAL LAW INSTITUTE PROCEEDINGS OF THE ROCKY MOUNTAIN MINERAL LAW FIFTY-SEVENTH ANNUAL INSTITUTE 5–1 (ROCKY MOUNTAIN MINERAL LAW FOUNDATION ed., 2011).

[24] *Id.*

[25] David S. Cohen, *Remarks From Under Secretary of Terrorism and Financial Intelligence David S. Cohen on "Addressing the Illicit Finance Risks of Virtual Currency,* DEPARTMENT OF THE TREASURY (Mar. 18, 2014), http://www.treasury.gov/press-center/press-releases/Pages/ jl236.aspx.

[26] 5 U.S.C. 553(b) (2015) (defining "meeting" as "the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business.").

[27] FOOD AND DRUG ADMINISTRATION, *Voting Procedures for Advisory Committee Meetings* (Aug. 2008), http://www.fda.gov/downloads/RegulatoryInformation/Guidances/UCM125641.pdf.

quality requirements of baby formula,[28] as well as the nutritional labeling for foods that are gluten-free or contain allergens.[29] Again, because the SCRUB Act's cost-estimate requirement does not distinguish between routine guidance and major rules, it is unclear whether agencies would continue to perform this function if each action triggered procedural hurdles under the SCRUB Act. This reverse incentive to avoid offering clarification or additional guidance would result in the inconsistent application of regulation and statutes by agency personnel. Without routine informal guidance, agency personnel would lack a consistent mechanism for applying rules and statutes. Worse still, the SCRUB Act would have a chilling effect on speech by agency officials, who would think twice before delivering statements or issuing press releases to inform the public of agency views or activity if every speech required a cost-estimate, shrouding agencies' practices and views from the public. Regardless of the result, the practical effects of this over-broad requirement would be to diminish agencies' ability to protect and inform the public through clarifications and updates of non-legislative and procedural rules.

Requiring cost estimates for every new rule would create daunting challenges for agencies. In a December 2014 report commissioned by the Administrative Conference of the United States (ACUS), Professor Joseph E. Aldy, an Assistant Professor of Public Policy at Harvard's John F. Kennedy School of Government, notes that the dearth of *ex post* cost and benefits estimates presents a major challenges for agencies to comply with the SCRUB Act:

> Generating an aggregate estimate of the costs of a given agency's suite of regulations—especially given the variations in the timing of costs (some rules impose large capital investments, which are one-shot investments, while others impose periodic operational costs), potential interactive impacts of multiple regulations (which could either increase or decrease aggregate costs relative to assessment of the individual regulations), and even potential interactive impacts of regulations with other agencies—is very difficult. Moreover, whatever estimate an independent commission would produce would be subject to quite significant uncertainty, which could be problematic given the precision within which the estimates would be used in determining whether a new regulation could go forward.[30]

The SCRUB Act is also silent on how agencies would calculate the costs of every new rule. Far from an exact science, costs are notoriously difficult for agencies to calculate.[31] The Office of Management and Budget (OMB) observed in its first annual report on the costs and benefits of Federal regulations that there are "enormous data gaps in the information available on regulatory benefits and

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[28] 21 CFR 106.96(i) (eligible infant formulas).

[29] *Food Allergens Guidance Documents & Regulatory Information,* FOOD AND DRUG ADMINISTRATION, http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/Allergens/default.htm (accessed on April 1, 2015).

[30] Joseph Aldy, *Learning from Experience: An Assessment of the Retrospective Reviews of Agency Rules and the Evidence for Improving the Design and Implementation of Regulatory Policy,* ADMIN. CONF. OF THE U.S. (Nov. 17, 2014), https://www.acus.gov/sites/default/files/documents/Aldy%2520Retro%2520Review%2520Draft%252011-17-2014.pdf.

[31] Shapiro, *supra* note 17, at 8.

costs."[32] If tasked with determining the costs of each regulatory action, agencies would likely rely on industry-supplied data, which routinely overstates the costs of rules.[33] In a review of several dozen environmental and occupational safety regulations, researchers repeatedly found that "cost estimates tend to be much higher than real-world compliance costs."[34] This is particularly true for the initial estimates of rules' costs, which were "at least double" their actual cost, and "could be seen more in the nature of debating points than objective cost assessments of costs."[35]

In addition to tasking agencies with calculating the costs of any new rule, Section 203 of the SCRUB Act would further require that OIRA certify the accuracy of these estimates. Currently, OIRA only reviews a small portion of "significant" proposed rules,[36] allowing it to efficiently allocate its finite resources to review the most pressing rules. By substantially expanding OIRA's mandate to include every regulatory action, the SCRUB Act would water-down OIRA's oversight of the rulemaking process. Additionally, requiring OIRA to review every new rule would facilitate greater political interference in the rulemaking process by giving the executive branch more control over congressionally-mandated rulemaking. In short, greater presidential control over rulemaking, in the wrong administration's hands, could undermine important health, safety, consumer protection, financial and other regulations by providing industry with an additional bottleneck for the issuance of rules. As a detailed analysis of the Bush Administration's involvement of the rulemaking process demonstrates that overly restrictive control of the rulemaking process by the executive branch undermines the public interests and circumvents legislative intent.[37]

B. Regulatory Cut-Go Would Require Agencies to Conduct a Costly and Time-Consuming Rulemaking Process for Each Rule Eliminated

The SCRUB Act would require agencies to offset the costs of virtually all agency action by eliminating an existing rule with equal or greater estimated cost. Agencies, however, are unable to simply rescind rules. Instead, the APA requires that agencies follow the same notice-and-comment procedures to eliminate a rule as would be required to issue the same rule in the first place.[38] Therefore, prior to eliminating any rule through regulatory cut-go, agencies must undertake a lengthy rulemaking process to carefully "examine the relevant data and articulate a satisfactory explanation for its action,"[39] thereby forcing agencies to undertake twice as much work to issue a single new rule. Prior to promulgating a new legislative rule, agencies would have to prepare two proposals: one for promulgating a new rule, and one for eliminating an existing rule

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[32] OFFICE OF MGMT. & BUDGET, 1998 REPORT OF OMB TO CONGRESS ON THE COSTS AND BENEFITS OF FEDERAL REGULATIONS 2 (1998).

[33] Thomas O. McGarity & Ruth Ruttenberg, *Counting the Cost of Health, Safety, and Environmental Regulation,* 80 TEX. L. REV. 1997, 2011, 2042 (2002)

[34] *Id.*

[35] *Id.*

[36] Exec. Order 12,866, 58 Fed. Reg. 51,735, § 6(b)(1) (1993).

[37] H. COMM. ON THE JUDICIARY MAJORITY STAFF, 111TH CONG., REINING IN THE IMPERIAL PRESIDENCY—LESSONS AND RECOMMENDATIONS RELATING TO THE PRESIDENCY OF GEORGE W. BUSH 186 (Comm. Print 2009).

[38] 5 U.S.C. § 551 (2015).

[39] *See* Motor Veh. Mfrs. Ass'n v. State Farm Ins., 463 U.S. 29, 31 (1983).

required by the Commission.[40] This process may take anywhere from a few months to several years,[41] especially when the underlying rule involves complex matters of science or economics.[42] And even though Congress specifically excluded non-legislative rules from this process,[43] the SCRUB Act's broad definition of rule would circumvent this commonsense exclusion.[44] Furthermore, unless agencies are able to justify the elimination of a rule through a rational basis supported by the rulemaking record, any rescission of a rule may be vacated as "arbitrary and capricious" under section 706 of APA.[45] Thus, the SCRUB Act would essentially function as a chokehold on agency rulemaking, delaying any new action by an agency and draining agency resources in a time of widespread budget austerity.[46]

C. The SCRUB Act Would Open the Floodgates to Legal Challenges to Rules Eliminated through Regulatory Cut-Go

In the event that agencies could overcome the procedural hurdles imposed by the SCRUB Act, courts would have ample opportunity to review any agency action to implement the statute, opening the floodgates of legal challenges. Title IV of the bill subjects an agency's compliance with the bill's cut-go procedures to judicial review. Additionally, the APA provides that "final agency action for which there is no other adequate remedy in a court [is] subject to judicial review," including those actions that are otherwise unreviewable.[47] Courts may therefore vacate any rule, including a rescission of a rule,[48] as "arbitrary and capricious" under section 706 of the APA unless the agency carefully reviews each rule eliminated and is able to justify the rescission of a rule through an adequate basis in the rulemaking record.[49] The Supreme Court has construed this standard to require a reviewing court to conduct a "searching and careful" review of agency action.[50] This type of heightened review under the arbitrary and capricious standard—also referred to as the "hard look" doctrine—requires courts to carefully analyze both the administrative record and the agency's explanation to review whether the agency applied the "correct analytical methodology, applied the right criteria, considered the relevant factors, chose from among the available range of regulatory options, relied upon appropriate policies, and pointed to adequate support in the record

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[40] *Id.*

[41] CENTER FOR EFFECTIVE GOVERNMENT, *Notice-and-Comment Rulemaking,* http://www.foreffectivegov.org/node/3463 (last visited April 1, 2015).

[42] *Regulations from the Executive in Need of Scrutiny Act of 2011: Hearing on H.R. 10 Before the Subcomm. on Courts, Commercial and Admin. L. of the H. Comm. on the Judiciary,* 112th Cong. (2011) (statement of David Goldston, Director of Government Affairs, Natural Resources Defense Council) ("Agencies often take several years to formulate a particular safeguard, reviewing hundreds of scientific studies, drawing on their own experts in science and economics, empaneling outside expert advisors, gathering thousands of public comments, and going though many levels of executive branch review"); CENTER FOR EFFECTIVE GOVERNMENT, *Notice-and-Comment Rulemaking,* http://www.foreffectivegov.org/node/3463 (last visited April 1, 2015).

[43] 5 U.S.C. § 553(b)(A) (2015) (excluding "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice" from section 553).

[44] Motor Veh. Mfrs. Ass'n v. State Farm Ins., 463 U.S. 29, 31 (1983).

[45] 5 U.S.C. § 706(2) (2015); Motor Veh. Mfrs. Ass'n v. State Farm Ins., 463 U.S. 29, 31 (1983).

[46] Shapiro, *supra* note 17, at 10.

[47] 5 U.S.C. §§ 702, 704 (2015). Any plaintiff that is "adversely affected or aggrieved" by a final agency action, including the recisision of a rule, may invoke judicial review. 5 U.S.C. § 702.; *see* Webster v. Doe, 486 U.S. 592 (1988); Oestereich v. Selective Service System, 393 U.S. 233 (1968).

[48] Motor Veh. Mfrs. Ass'n v. State Farm Ins., 463 U.S. 29, 31 (1983).

[49] 5 U.S.C. § 706(2) (2015); Motor Veh. Mfrs. Ass'n v. State Farm Ins., 463 U.S. 29, 31 (1983).

[50] Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 407–09 (1971).

for material empirical conclusions."[51] The SCRUB Act lacks any clarification of the Commission's methodology for reviewing rules, as well as any limit on the criteria the Commission must follow for identifying rules that must be repealed so long as rescinding these rules would "eliminate or reduce unnecessarily burdensome costs to the United States economy" pursuant to section 101 of the bill. It is doubtful that the Commission's blank-check to identify rules to eliminate through cut-go would provide agencies with adequate empirical support to satisfy the hard-look doctrine's requirement of a thorough administrative record supporting a rule's recision,[52] making it unlikely that the SCRUB Act's process of regulatory cut-go would even withstand judicial scrutiny.

D. Regulatory Cut-Go Would Disproportionately Affect New Agencies, Inviting Controversy and Discouraging Government Efficiency

The SCRUB Act would create strong disincentives to streamline government agencies or respond to crises through the creation of new agencies. Regulatory cut-go applies to *any* agency that promulgates rules without exception, creating substantial uncertainty for a newly-created agency starting with a regulatory budget of $0.[53] If regulatory cut-go applies to the entire regulatory budget of an administration, then the initial regulation issued by new agency would have to displace an existing regulation from another agency. If, however, the bill's procedural hurdles only apply to the regulatory budget of each agency, it is unclear whether Congress would have to specifically exempt new agencies from regulatory cut-go, or if these agencies would borrow through other agencies' regulatory budgets. For instance, if regulatory cut-go existed prior to the creation of the Consumer Financial Protection Bureau (CFPB), an entirely new agency created in the wake of the financial crisis, either an agency separate from the CFPB would have to offset a new rule issued by the CFPB, or Congress would have needed to provide a special exemption for the CFPB due to the agency's inability to function without a regulatory budget.[54] Regardless of how new agencies would address these difficult, unnecessary, and controversial choices, the SCRUB Act would create barriers to reorganizing agencies to more effectively serve the public interest.[55]

II. THE SCRUB ACT WOULD UNDERMINE AGENCIES' ABILITY TO PROTECT PUBLIC HEALTH AND SAFETY

A. The Scrub Act Would Force Agencies to Make a Dangerous False Choice Between Existing Rules and New Rules to Protect the Public Health and Safety

Regulatory cut-go imposes a false choice between existing protections and responding to a new threat to public health and safety. If an agency needed to respond to an imminent hazard to the public or environment, it would have to either rescind an existing rule that is haphazardly identified by the Commission's arbitrary and

[51] Thomas O. McGarity, *Some Thoughts on Deossifying the Rulemaking Process,* 41 DUKE L.J. 1385, 1410 (1992).
[52] Shapiro, *supra* note 17, at 10.
[53] *See id.* at 9.
[54] *Id.*
[55] *See id.*

cost-centric process, or choose not to act. Testifying in opposition to H.R. 1155, Amit Narang, a Regulatory Policy Advocate for Public Citizen, argued that "title II would potentially prevent agencies from putting forth critical new regulations of a similar magnitude that were identified by the [Commission] and approved by Congress that were not concurrently removed."[56] Narang further observed that this requirement would potentially require the Department of Transportation to eliminate existing auto-safety rules, such as requiring seatbelts in cars, before issuing rules requiring additional auto-safety features.[57] Regardless of how it is implemented, the SCRUB Act would force agencies to choose the least-worst option, leaving the public and the environment without safeguards against risks that agencies have identified.[58]

Highlighting the importance of the "many public health and safety benefits that Federal regulations advance and protect," Representative David Cicilline (D-RI) offered an amendment to except from the bill any rule issued by the Food and Drug Administration.[59] Representative Cicilline observed that H.R. 1155 "is based on the idea that the absolute value of a rule is limited to the cost that it may impose on corporate or businesses interest," and that "ultimately this bill asks us to prioritize those interests at the cost of the public good."[60] Speaking in support of Representative Cicilline's amendment, Representative John Conyers, Jr. (D-MI) argued flexible agency rulemaking is necessary to the public interest, and that H.R. 1155's "burdensome regulatory framework would delay or sometimes even prevent agencies from protecting public health and safety, including the FDA."[61] This amendment failed along party lines by a vote of 8 to 13.[62] Recognizing the false choice that the SCRUB Act imposes on agency rulemaking, Representative David Cicilline (D-RI) offered an additional amendment to H.R. 1155 that excepted from the bill rules issued by the Department of Veterans Affairs.[63] This amendment also failed along party lines by a vote of 9 to 17.[64]

To further illustrate how H.R. 1155 would interfere with the "responsibilities of the actual agency to really do its job and its mission," Representative Sheila Jackson Lee (D-TX) offered an amendment that would except from the SCRUB Act any rule issued by the Department of Homeland Security.[65] Speaking in support of her amendment, Representative Jackson Lee noted that through her position as a senior Member of the Homeland Security Committee, she well-understood the challenges that face the Department of Homeland Security and its important function in preventing terror threats, which would be slowed and undermined by

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[56] *See H.R. 1155 Hearing, supra* note 11, at 9.
[57] *Id.* at 9–10.
[58] Shapiro, *supra* note 17, at 5 ("Regulatory pay-go completely ignores this less [of cost-benefit analysis], and thus is even more extreme than cost-benefit analysis in its disregard of regulatory benefits.").
[59] Tr. of Markup of H.R. 1155, "Searching for and Cutting Regulations that are Unnecessarily Burdensome Act of 2015 by the H. Comm. on the Judiciary, 114th Cong. 136 (March 24, 2015), http://judiciary.house.gov/_cache/files/26476c04-a8fb-48a1-96cc-914ea82f001c/03.24.15-markup-transcript.pdf [hereinafter Markup Tr.].
[60] *Id.* at 137.
[61] *Id.* at 139.
[62] *Id.* at 145.
[63] *Id.* at 155.
[64] *Id.* at 175.
[65] *Id.*

H.R. 1155.[66] Rather than engaging in a wasteful and redundant analysis of all of its rules, Representative Jackson Lee concluded that the Department of Homeland Security should be focused "on the crucial mission of securing the homeland."[67] Speaking in support of this amendment, Representative Conyers stated that "effective rulemaking is a critical tool for the Department of Homeland Security to protect the nation from acts of terrorism," among other things.[68] This amendment also failed along party lines by a vote of 8 to 15.[69]

B. The Scrub Act Lacks Any Flexibility for Agency Response to Urgent Public Health and Safety Matters through Emergency Rulemaking

Title II of the SCRUB Act fails to provide any exception from cumbersome procedural hurdles for agencies to issue emergency rules that protect the public and environment from imminent harm. Agencies often promulgate emergency rules in a timely response to immediate threats to public health and safety. Indeed, the APA specifically permits agencies to finalize rules not subject to the notice-and-comment process where the agency has good cause for genuine emergencies.[70]

For instance, the U.S. Department of Transportation last year issued an emergency order in response to the derailment of a railroad train in Quebec, Canada that killed 47 people,[71] with requirements for additional safety procedures to prevent railroad accidents involving the sudden release of flammable liquids.[72] Following a "string of fiery accidents" in North Dakota, Alabama, and Virginia, the Department of Transportation also issued an emergency order in May 2014, requiring railroads that carry more than one million gallons of fuel to provide certain information to the Department.[73] The Department of Transportation thereafter issued another emergency order following the derailment of a train carrying crude oil in downtown Lynchburg, Virginia that spilled thousands of gallons of oil into the James River.[74] This oil later caught fire and disbursed throughout the James River, traveling in an oil slick that was 17 miles long toward Richmond and the Chesapeake Bay.[75] Following the train's derailment, officials stated that "2 to 5 trains carrying at least one million gallons of oil pass through 20 Virginia counties weekly,"[76] demonstrating the importance of swift agency response. Observing that railroad shipments of crude oil were causing an unsafe condition, the Department of Transportation found that a "pattern of releases and fires involving petroleum crude oil

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[66] *Id.* at 148.
[67] *Id.* at 152.
[68] *Id.* at 151.
[69] *Id.* at 158.
[70] STAFF OF S. COMM. ON THE JUDICIARY, 79TH CONG., ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY (1946) (requiring that agencies publish a "true and supported or supportable finding of necessity or emergency" when using the good cause exception).
[71] Matthew Brown, *U.S. Railroads Disclose Figures, Details on Volatile Oil Train Shipments,* CALGARY HERALD (June 25, 2014), http://www.calgaryherald.com/business/Railroads+disclose+figures+details+volatile+train+shipments/9970734/story.html.
[72] 49 CFR 232.103(n).
[73] Brown, *supra* note 71.
[74] Curtis Tate, *Lynchburg, Va., Oil Train Derailment Illustrates Threat to Rivers,* MCCLATCHYDC (May 2, 2014) http://www.mcclatchydc.com/2014/05/02/226425/lynchburg-va-oil-train-derailment.html.
[75] *Id.*
[76] Brown, *supra* note 71.

shipments originating from the Bakken and being transported by rail constitute an imminent hazard under 49 U.S.C. 5121(d)," justifying the emergency order.[77] In each response to unsafe conditions, the Department of Transportation issued orders to protect the public safety and environment. Prior to these orders, railroads were under no obligation to notify emergency responders when trains carrying millions of gallons of crude oil passed through their states.[78] The SCRUB Act's cut-go procedures, however, would have prevented the Department of Transportation from issuing these orders without first identifying the cost of the order and then offsetting this cost by eliminating a rule identified by the Commission, which in turn would trigger the APA's rulemaking process for rescinding a rule.[79] Although the APA's good cause exception does not require that agencies provide a notice-and-comment period for genuine emergencies,[80] the SCRUB Act fails to provide any such flexibility for agencies to bypass the cut-go procedures while issuing emergency rules to protect the public and environment from imminent harm, creating a serious risk to the safety of the public and environment. Thus, even though Congress sought to encourage agency efficiency and speed when responding to public emergencies by establishing a good-cause exception to the APA's comment and notice requirements for legislative rules, the SCRUB Act would effectively eviscerate this exception, impairing the ability of any agency to respond to any threat to public health, safety, and the environment, no matter how dangerous or imminent.

Recognizing the threat that the SCRUB Act poses to agencies' ability to respond to urgent public health and safety matters, Representative Suzan DelBene (D-WA) offered an amendment to except from the bill all rules made by an agency in response to an emergency.[81] Speaking in support of her amendment, Representative DelBene noted that this amendment confronts the faulty premise of H.R. 1155 and other anti-regulatory bills, stating that "there's no shortage of ways for this Committee to attack regulations and regulators that are focused on keeping our food and medications safe; our air and water clean; and our families safe."[82] Representative DelBene also observed that H.R. 1155 would prevent Federal agencies from providing relief to local communities following a natural disaster, such as the landslide in Oso, Washington, which was a "horrific natural disaster that took the lives of 43 people" last year.[83] Representative DelBene further argued that H.R. 1155 would not only prevent an effective and timely response by Federal agencies to disasters like the Oso landslide by requiring "regulatory cut-go when people's lives are at risk," but the bill would also politicize public health and safety by creating leverage for attacking unpopular regulations at times of crisis.[84]

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[77] DEPT. OF TRANSPORTATION, *Petroleum Crude Oil Railroad Carriers,* DOT–OST–2014–0067, Petroleum Crude Oil Railroad Carriers (May 7, 2014), http://www.dot.gov/briefing-room/emergency-order.

[78] Jad Mouawad, *U.S. Issues Safety Alert for Oil Trains,* NEW YORK TIMES (May 7, 2014), http://www.nytimes.com/2014/05/08/business/us-orders-railroads-to-disclose-oil-shipments.html.

[79] *See* Motor Veh. Mfrs. Ass'n v. State Farm Ins., 463 U.S. 29, 31 (1983).

[80] STAFF OF S. COMM. ON THE JUDICIARY, 79TH CONG., ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY (1946) (requiring that agencies publish a "true and supported or supportable finding of necessity or emergency" when using the good cause exception).

[81] Markup Tr., *supra* note 59, at 125.

[82] *Id.* at 126.

[83] *Id.*

[84] *Id.*

Speaking in support of this amendment, Representative Hank Johnson, Jr. (D-GA) agreed that H.R. 1155 "imposes a false choice between existing protections and issu[ing] new rules in response to an emerging threat to public safety and health."[85] This amendment failed along party lines by a vote of 8 to 13.[86]

To address the totality of these concerns raised by regulatory cut-go, Representative Hank Johnson Jr. (D-GA) offered an amendment to eliminate the SCRUB Act's cut-go requirement by striking Title II of the bill.[87] Noting that regulatory cut-go would have far-reaching consequences for every new agency rule, he stated that regulatory cut go is "unsafe, dangerous, and would tie the hands of agencies responding to a public health crisis requiring timely regulatory responses."[88] This amendment failed along party lines by a vote of 5 to 12.[89]

III. THE SCRUB ACT IS A SOLUTION IN SEARCH OF A PROBLEM

A. The SCRUB ACT is Yet Another Anti-Regulatory Bill Based on False Assumptions

The SCRUB Act's regulatory cut-go process is premised on the misguided belief that the public cannot benefit from new public protections and safeguards unless old ones are repealed. Proponents of so-called regulatory "reform" measures like the SCRUB Act claim that regulation imposes such costs on businesses that it stifles economic growth and job creation. In support of this contention, they repeatedly cite a widely-debunked study by economists Mark and Nicole Crain that claims Federal regulation imposes an annual cost of $1.75 trillion on business.[90] The Crain study, however, has been extensively criticized for exaggerating the costs of Federal rulemaking. For example, the Center for Progressive Reform (CPR) notes that the $1.75 trillion cumulative burden cited by the study fails to account for any benefits of regulation.[91] CPR observed that OMB estimated in 2008 that major rules imposed $46 billion to $54 billion in costs, but also produced $122 billion to $656 billion in benefits.[92] Moreover, the study's methodology is flawed with respect to how it calculated economic costs. The study, which relied on international public opinion polling by the World Bank on how friendly a particular country was to business interests, ignored actual data on costs imposed by Federal regulation in the United States.[93]

The Congressional Research Service (CRS) also conducted an extensive examination of the Crain study and criticized much of its methodology.[94] CRS noted that the authors of the Crain study themselves told CRS that their study was "not meant to be a decision-making tool for lawmakers or Federal regulatory agencies to

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[85] *Id.* at 129.
[86] *Id.* at 135.
[87] *Id.* at 99.
[88] *Id.* at 100.
[89] *Id.* at 125.
[90] Nicole V. Crain & W. Mark Crain, *The Impact of Regulatory Costs on Small Firms*, Rep. No. SBAHQ–08–M–0466 (Sept. 2010), http://archive.sba.gov/advo/research/rs371tot.pdf.
[91] Sidney Shapiro, *et al., Setting the Record Straight: The Crain and Crain Report on Regulatory Costs,* CENTER FOR PROGRESSIVE REFORM (Feb. 2011).
[92] *Id.*
[93] *Id.*
[94] CURTIS W. COPELAND, CONG. RESEARCH SERV., R41763, ANALYSIS OF AN ESTIMATE OF THE TOTAL COSTS OF FEDERAL REGULATIONS (2011).

use in choosing the 'right' level of regulation. In no place in any of the reports do we imply that our reports should be used for this purpose. (How could we recommend this use when we make no attempt to estimate the benefits?)"[95] CRS concluded that "a valid, reasoned policy decision can only be made after considering information on both costs and benefits" of regulation.[96]

In his testimony regarding H.R. 1155, Amit Narang, a Regulatory Policy Advocate at Public Citizen, likewise noted that there is "simply no credible, independent, and peer-reviewed empirical evidence supporting the claim that there is a trade-off between economic growth and strong, effective regulatory standards."[97] Narang added that evidence that is used in support of anti-regulatory bills "doesn't pass muster" when scrutinized:

> For example, the *Washington Post* recently vetted a report entitled "the Ten Thousand Commandments" from the Competitive Enterprise Institute claiming that the annual regulatory burden adds up to $15,000 for each household in America or 1.8 trillion for the whole country. As the *Post* notes, the report foregoes any attempt at computing the benefits of the regulations it includes and the Post found that the report has "serious methodological problems" and deserved "two pinocchios" given that the report's authors themselves admit that the report is "not scientific" and "back of the envelope." Reports using similar methodology and reporting similar figures have also been exposed as flawed and have been disavowed.[98]

Bruce Bartlett, a senior policy analyst in the Reagan and George H.W. Bush Administrations, has also refuted the claim that regulations undermine the economy or job growth, explaining that "[n]o hard evidence is offered for this claim; it is simply asserted as self-evident and repeated endlessly throughout the conservative echo chamber."[99] At a legislative hearing held by the Subcommittee on a prior anti-regulatory bill, the Majority's own witness debunked the myth that regulations stymie job creation. Christopher DeMuth stated on behalf of the American Enterprise Institute, a conservative think tank, that the "focus on jobs . . . can lead to confusion in regulatory debates" and that "the employment effects of regulation, while important, are indeterminate."[100]

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[95] *Id.* at 26 (quoting an e-mail from Nicole and W. Mark Crain to the author of the CRS report).

[96] *Id.* The Economic Policy Institute also issued a critique of the Crain study outlining additional concerns with the study's methodology and data. *See* John Irons and Andrew Green, *Flaws Call for Rejecting Crain and Crain Model: Cited $1.75 Trillion Cost of Regulations Is Not Worth Repeating,* ECONOMIC POLICY INSTITUTE (July 19, 2011), http://w3.epi-data.org/temp2011/IssueBrief308.pdf.

[97] *See H.R. 1155 Hearing, supra* note 11, at 2.

[98] *Id.* at 3.

[99] Bruce Bartlett, Op-Ed., *Misrepresentations, Regulations and Jobs,* N.Y. TIMES ECONOMIX (Oct. 4, 2011), http://economix.blogs.nytimes.com/2011/10/04/regulation-and-unemployment.

[100] *The Regulatory Accountability Act of 2011: Hearing on H.R. 3010 Before the H. Comm. on the Judiciary,* 112th Cong. 64–65 (2011) (prepared statement of Christopher DeMuth, American Enterprise Institute); *see, e.g.,* Jia Lynn Yang, *Does Government Regulation Really Kill Jobs? Economists Say Overall Effect Minimal,* WASH. POST, Nov. 13, 2011, http://www.washingtonpost.com/business/economy/does-government-regulation-really-kill-jobs-economists-say-overall-effect-minimal/2011/10/19/gIQALRF5IN_story.html?hpid=z1 ("In 2010, 0.3 percent of the people who lost their jobs in layoffs were let go because of 'government regulations/intervention.' By comparison, 25 percent were laid off because of a drop in business demand. . . . Economists who have studied the matter say that there is little evidence that regulations cause massive job loss in the economy, and that rolling them back would not lead to a boom in job cre-

If anything, regulations can *promote* job growth and put Americans back to work. For instance, the BlueGreen Alliance has noted that studies of the direct impact of regulations have concluded that "most regulations result in modest job growth or have no effect, and economic growth has consistently surged forward in concert with these health and safety protections."[101] The OMB observed that 40 years of success of the Clean Air Act "have demonstrated that strong environmental protections and strong economic growth go hand in hand."[102] Similarly, the Natural Resources Defense Council, the United Auto Workers, and the National Wildlife Federation jointly issued a report finding that vehicle emissions standards and clean vehicle research, development and production are already responsible for 155,000 jobs at 504 facilities in 43 states and the District of Columbia.[103] According to the same report, 119,000 jobs were created in this industry between 2009 and 2011 alone.[104]

Similarly, it was estimated in 2012 that a pending rule under the Clean Air Act requiring power plants to reduce mercury and other toxic emissions by 90 percent in the next 5 years would create 45,000 temporary construction jobs over the next 5 years and possibly 8,000 permanent jobs because of the upgrades required by the new rule.[105] This job growth would be in addition to the rule's expected benefit of preventing 11,000 deaths from heart attacks and respiratory diseases like asthma.[106]

Additionally, a report by Northeast States for Coordinated Air Use Management (NESCAUM) demonstrates a direct correlation between environmental regulations and job growth in the Northeast. It found that by enacting stricter fuel economy standards and pursuing cleaner forms of energy, more jobs would be created.[107] Specifically, NESCAUM found that stricter fuel economy standards and regulations governing cleaner forms of energy would increase employment from 9,490 to 50,700 jobs; increase gross regional product, a measure of the states' economic output, by $2.1 billion

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ation."); *See* Tara M. Sinclair & Kathryn Vesey, *Regulation, Jobs, and Economic Growth: An Empirical Analysis* 27, (THE GEORGE WASHINGTON UNIVERSITY REGULATORY STUDIES CENTER, Working Paper), at 27 (finding that the "macroeconomic effects of regulation are uncertain" and that the study's "results reveal no impact" when considering either the impact of regulations on the "total economy or strictly the private sector"), *available at* http://regulatorystudies.columbian.gwu.edu/files/downloads/032212_sinclair_vesey_reg_jobs_growth.pdf.

[101] Letter to Rep. Lamar Smith (R-TX), Chair, & Rep. John Conyers, Jr. (D-MI), Ranking Member, H. Comm. on the Judiciary, from David A. Forster, Executive Director, BlueGreen Alliance, at 2 (Nov. 2, 2011) (on file with the H. Committee on the Judiciary, Democratic Staff).

[102] OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY ON H.R. 2401, TRANSPARENCY IN REGULATORY ANALYSIS OF IMPACTS ON THE NATION ACT OF 2011 (Sept. 21, 2011), https://www.whitehouse.gov/sites/default/files/omb/legislative/sap/112/saphr2401h_20110921.pdf.

[103] NATURAL RESOURCES DEFENSE COUNCIL *et al., Supplying Ingenuity: U.S. Suppliers of Clean, Fuel-Efficient Vehicle Technologies* (Aug. 2011), http://www.nrdc.org/transportation/autosuppliers/files/SupplierMappingReport.pdf.

[104] *Id.*

[105] Editorial, *The Job-Creating Mercury Rule,* N.Y. TIMES (Feb. 22, 2012), http://www.nytimes.com/2012/02/23/opinion/the-job-creating-mercury-rule.html.

[106] *Id.*

[107] NORTHEAST STATES FOR COORDINATED AIR USE MANAGEMENT (NESCAUM), ECONOMIC ANALYSIS OF A PROGRAM TO PROMOTE CLEAN TRANSPORTATION FUELS IN THE NORTHEAST/MID-ATLANTIC REGION (2011) (on file with Natural Resources Defense Council) http://switchboard.nrdc.org/blogs/ngreene/CFS%20Economic%20Analysis%20Report%20INTERNAL.PDF

to $4.9 billion; and increase household disposable income increases by $1 billion to $3.3 billion.[108]

Anti-regulatory proponents also rely on an equally flawed corollary argument that regulatory uncertainty undermines economic and job growth. Bruce Bartlett, the senior economic official from the Reagan and Bush Administrations, observes that "regulatory uncertainty is a canard invented by Republicans that allows them to use current economic problems to pursue an agenda supported by the business community year in and year out."[109] Likewise, Professor Sidney Shapiro testified before the Subcommittee in the 112th Congress that "[a]ll of the available evidence contradicts the claim that regulatory uncertainty is deterring business investment."[110] In fact, a July 2011 *Wall Street Journal* survey of business economists found that the "main reason U.S. companies are reluctant to step up hiring is scant demand, rather than uncertainty over government policies."[111] Not surprisingly, a September 2011 National Federation of Independent Business survey of its members found that "poor sales"—not regulation—is the biggest problem.[112] Indeed, the Main Street Alliance, a small business organization, has noted that "[i]n survey after survey and interview after interview, Main Street small business owners confirm that what we really need is more customers—more demand—not deregulation."[113]

B. The SCRUB Act's Solution to "Over-Regulation" is an Unbalanced and Redundant Review That Agencies Already Conduct

Even if one were to accept the false premise that regulations impede job growth and harm the economy, the SCRUB Act represents a redundant and arbitrary solution to any such problem. Agencies regularly conduct retrospective reviews.[114] In fact, retrospective review has been a top priority under the Obama Administration,[115] and Congress has long prescribed that agencies review regulations to determine whether any should be revoked or modified.

1. Congress Already Has Tools for Conducting Effective Oversight of Rulemaking and Enforcing Retrospective Review

Congress already has numerous tools for influencing Federal rules. In addition to its numerous tools for exercising oversight,

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[108] *Id.*

[109] Bartlett, *supra* note 99.

[110] *Regulatory Accountability Act of 2011: Hearing on H.R. 3010 Before the H. Comm. on the Judiciary,* 112th Cong. 1 (2011) (statement of Prof. Sidney Shapiro, Wake Forest School of Law) http://judiciary.house.gov/ files/hearings/pdf/Shapiro%2010252011.pdf

[111] Phil Izzo, *Dearth of Demand Seen Behind Weak Hiring,* WALL ST. J., July 18, 2011, *available at* http://online.wsj.com/article/SB10001424052702303661904576452181063763332.html.

[112] PRESS RELEASE, NAT'L FEDERATION OF INDEPENDENT BUSINESSES, *Small Business Confidence Takes Huge Hit: Optimism Index Now in Decline for Six Months Running* (Sept. 13, 2011) ("Of those reporting negative sales trends, 45 percent blamed faltering sales, 5 percent higher labor costs, 15 percent higher materials costs, 3 percent insurance costs, 8 percent lower selling prices and 10 percent higher taxes and regulatory costs."), http://www.nfib.com/press-media/press-media-item?cmsid=58190.

[113] Letter to Rep. Lamar Smith (R-TX), Chair, & Rep. John Conyers, Jr. (D-MI), Ranking Member, H. Committee on the Judiciary, from Jim Houser, Co-Chair, The Main Street Alliance, *et al.,* at 1–2 (Nov. 2, 2011) (on file with the H. Committee on the Judiciary, Democratic Staff).

[114] *H.R. 4874 Hearing, supra* note 84, at 2 (statement of Ronald M. Levin, Professor of Law, Washington University School of Law).

[115] Cheryl Bolen, *Shelanski Considering Changes in Agency Rulemaking Processes in Year Ahead,* BLOOMBERG BNA DAILY REPORT FOR EXECUTIVES (Jan. 16, 2014), http://www.bna.com/shelanski-considering-changes-n17179881447.

Congress may shape agency missions through the appropriations process or by narrowing agency authority through statute.[116] Congress may also disapprove any rule proposed by an agency through the Congressional Review Act,[117] or pass legislation to stay the effect of an existing rule. For instance, the House attempted to do this in the in the 112th Congress, passing legislation in response to the Environmental Protection Agency's cement manufacturing standards.[118]

Furthermore, Congress has already enacted several legislative mandates that require retrospective review.[119] Section 610 of the Regulatory Flexibility Act (RFA) requires periodic evaluation of existing regulations that affect small business entities.[120] The RFA also tasks agencies with demonstrating the continued need for rules, whether the agency has received complaints from the public concerning the rule, the complexity of the rule, and the extent to which the rule is duplicative or overlaps with other Federal rules, or State and local government rules.[121] In 1996, the Economic Growth and Regulatory Paperwork Reduction Act was enacted,[122] requiring requires certain financial agencies, such as the Federal Deposit Insurance Corporation, to conduct a review of their regulations every 10 years.[123] Other reviews are conducted at the discretion of the agency.[124]

2. The Administration Has Issued Several Executive Orders Requiring Retrospective Review

Retrospective review is also a top priority for the Obama Administration.[125] Since 2011, President Obama has issued a series of Executive Orders to have agencies conduct meaningful retrospective reviews.[126] In January 2011, President Obama issued Executive Order 13563 directing agencies to "consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned."[127] The Executive Order further directs each agency to: "develop and submit to [OIRA] a preliminary plan, consistent with law and its resources and regulatory priorities, under which the agency will periodically review its existing significant regulations to determine whether any such regulations should be modified, streamlined, expanded, or repealed so as to make the agency's regulatory program more effective or less burdensome in achieving regulatory objectives." Soon thereafter, President Obama issued

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[116] *See, e.g.,* CONG.RESEARCH SERV., RL 34354, CONGRESSIONAL INFLUENCE ON RULEMAKING AND REGULATION THROUGH APPROPRIATIONS RESTRICTIONS, (2008).

[117] 5 U.S.C. § 801(b) (2013).

[118] Cement Sector Regulatory Relief Act of 2011, H.R. 2681, 112th Cong. (2011).

[119] *H.R. 4874 Hearing, supra* note 22 (statement of Ronald M. Levin, Professor of Law, Washington University School of Law).

[120] Pub. L. No. 96–354, 94 Stat. 1164, 1169 (1980).

[121] 5 U.S.C. § 610 (2015).

[122] Pub. L. No. 104–208, § 2222, 110 Stat. 3009 (1996), codified at 12 U.S.C. § 3311 (2015). Other agencies subject to this statutory mandate are the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, and the Consumer Financial Protection Bureau.

[123] *Id.*

[124] GAO REPORT, *supra* note 13, at 5.

[125] Bolen, *supra* note 115.

[126] *H.R. 4874 Hearing, supra* note 22, at 2 (statement of Ronald M. Levin, Professor of Law, Washington University School of Law).

[127] Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 18, 2011).

Executive Order 13579 in July 2011 encouraging independent regulatory agencies to "consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned."[128] These analyses, together with supporting data and evaluations, should be released online whenever possible, according to the Executive Order. In addition, the Executive Order asked each independent regulatory agency to "develop and release to the public a plan, consistent with law and reflecting its resources and regulatory priorities and processes, under which the agency will periodically review its existing significant regulations to determine whether any such regulations should be modified, streamlined, expanded, or repealed so as to make the agency's regulatory program more effective or less burdensome in achieving the regulatory objectives."[129] Such plans were required to be filed within 120 days from the date of the Executive Order.

In May 2012, President Obama issued yet another Executive Order requiring agencies to "conduct retrospective analyses of existing rules to examine whether they remain justified and whether they should be modified or streamlined in light of changed circumstances, including the rise of new technologies."[130] In particular, this Executive Order directed agencies to "invite, on a regular basis . . . public suggestions about regulations in need of retrospective review and about appropriate modifications to such regulations."[131] The Executive Order required agencies to "give priority, consistent with law, to those initiatives that will produce significant quantifiable monetary savings or significant quantifiable reductions in paperwork burdens while protecting public health, welfare, safety, and our environment."[132] In addition, the Executive Order directed agencies to "give special consideration to initiatives that would reduce unjustified regulatory burdens or simplify or harmonize regulatory requirements imposed on small businesses.[133]

According to Cass Sunstein, who served as OIRA Administrator from 2009 to 2012, these Orders cumulatively "energized" agencies to identify nearly 600 outdated rules for elimination.[134] Agencies have already finalized or formally proposed over a hundred of these reforms.[135] For instance, the Department of Health and Human Services (HHS) has finalized several rules to remove hospital and healthcare reporting requirements, saving $5 billion over 5

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[128] Exec. Order No. 13,579, 76 Fed. Reg. 41587 (July 14, 2011). Independent regulatory agencies are "independent" in the sense that they are independent of the President. The President has limited authority to remove their leaders (usually, heads of such agencies can only be removed for cause, rather than at the President's pleasure). STEPHEN G. BREYER, ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY 100 (4th ed., Aspen Publishers, Inc. 1999). Such agencies are usually styled "commissions" or "boards" (e.g., the Securities and Exchange Commission, the Federal Communications Commission, the National Labor Relations Board).

[129] *Id.*

[130] Exec. Order. 13610, 77 Fed. Reg. 28467 (May 14, 2012).

[131] *Id.*

[132] *Id.*

[133] *Id.*

[134] Cass R. Sunstein, *The Regulatory Lookback,* 94 B.U. L. REV. 579, 593 (2014), http://www.bu.edu/bulawreview/files/2014/08/SUNSTEINDYSFUNCTION.pdf.

[135] *See* Cary Coglianese, *Moving Forward with Regulatory Lookback,* 30 YALE J. ON REG. 57, 58 (2013).

years.[136] Additionally, as Howard Shelanski, the current OIRA Administrator, recently noted, OIRA plans to establish "more concrete ways to deepen and strengthen retrospective review."[137] Combined, these good-government initiatives have already resulted in hundreds of formal proposals to eliminate rules, representing billions of dollars in savings over the next several years,[138] and substantially more in eventual savings.[139]

3. The SCRUB Act's Meat-Cleaver Approach to Rulemaking Would Create Immense Bureaucratic Hurdles without Addressing the Critical Barriers to Effective Retrospective Review

The existing processes for retrospective review are a smart, scalpel-like approach to regulatory revisions. The overwhelming consensus of administrative law experts support a balanced and affordable approach to retrospective review that allows for agency flexibility and selectivity to target rules for elimination. In contrast, not even the conservative proponents of regulatory cut-go support a meat-cleaver approach to every regulation, which will only increase bureaucratic red tape and uncertainty.

There is broad consensus from the nonpartisan Administrative Conference of the United States (ACUS) that any retrospective review should be selective, flexible, and even-handed. These goals reflect the assessments and expertise of a broad group of practitioners, agency personnel, and academics in the administrative law field. In its recommendations on retrospective review, ACUS noted that any review should give agencies "maximum flexibility to design processes that are sensitive to individual agency situations and types of regulations."[140] Given differences among agencies, ACUS stated that such processes should be "tailored to meet agencies' individual needs" and that the President as well as Congress "should avoid mandating standardized or detailed requirements."[141] ACUS also recommended that the review should focus on the most important regulations with sufficient time and resources to ensure a meaningful review.[142] In a report adopted in December 2014, ACUS confirmed this view, urging that each agency "tailor its regulatory lookback procedures to its statutory mandate, the nature of its regulatory mission, its competing priorities, and its current budgetary resources," while finding that "retrospective review is not a "one-size-fits-all" enterprise."[143]

The GAO has likewise reported that the "most critical barrier" to effective retrospective review is agencies' "difficulty in devoting the time and staff resources required for reviews while also car-

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[136] DEP'T OF HEALTH & HUM. SERVS., PLAN FOR RETROSPECTIVE REVIEW OF EXISTING RULES 3, 8–17 (2011), http://www.whitehouse.gov/sites/default/files/other/2011-regulatoryaction-plans/healthandhumanservicesregulatoryreformplanaugust2011.pdf.

[137] Bolen, *supra* note 115.

[138] COUNCIL OF ECON. ADVISERS, EXEC. OFFICE OF THE PRES., SMARTER REGULATIONS THROUGH RETROSPECTIVE REVIEW 6 (2012), http://www.whitehouse.gov/sites/default/files/lookback_report_rev_final.pdf.

[139] Sunstein, *supra* note 134.

[140] ADMINISTRATIVE CONFERENCE OF THE U.S., *Review of Existing Agency Regulations, Recommendation* 95–3 (adopted June 15, 1995).

[141] *Id.*

[142] *Id.* at 1–2.

[143] ADMINISTRATIVE CONFERENCE OF THE U.S., *Retrospective Review of Agency Rules, Recommendation* 95–3 (adopted December 4, 2014).

rying out other mission activities."[144] Much like ACUS' recommendation that retrospective review be selective and flexible, GAO found that "it is not necessary or even desirable for agencies to expend their time and resources reviewing all of their regulations."[145] Rather, agencies should "conduct substantive reviews of a small number of regulations that agencies and the public identify as needing attention."[146]

Unlike the retrospective review advocated by ACUS and the GAO, the SCRUB Act's mandate of an unlimited and unbalanced review of all regulations would create immense bureaucratic hurdles to effective retrospective review. Furthermore, even the conservative proponents of regulatory cut-go acknowledge that legislation like the SCRUB Act is "uncharted policy territory" with major shortcomings.[147] Noting that potential perils of regulatory cut-go, the conservative Competitive Enterprise Institute (CEI) recommended that Congress should proceed in a step-by-step experiment through pilot programs to test the feasibility of regulatory cut-go.[148] CEI also noted that the result of this process could be to "make regulation less accountable."[149] Acknowledging that legislation like the SCRUB Act could spawn substantial paperwork burdens and fines, CEI observed that Congress may even need to create a separate regulatory audit agency, similar to the Internal Revenue Service (IRS), to "promulgate rules to standardize accounting procedures and reporting requirements" for costs to agencies.[150]

H.R. 1155 SECTION-BY-SECTION EXPLANATION

A description of the bill's principal substantive provisions follows.

Sec. 1. Short Title. Section 1 sets forth the short title of the bill as the "Searching for and Cutting Regulations that are Unnecessarily Burdensome Act of 2015" or as the "SCRUB Act of 2015."

Title I—Retrospective Regulatory Review Commission

Sec. 101. In General. Section 101 establishes the Retrospective Regulatory Review Commission to review rules and "sets of rules" in accordance with specified criteria to determine whether such rules should be repealed "to eliminate or reduce the costs of regulation to the economy." The Commission's life-span is 5 years and 180 days.

Subsection (b) states that the Commission is to be composed of nine members appointed by the President and confirmed by the Senate. The President appoints the Commission Chair, who must be chosen from among past Administrators of OIRA, Administrative Conference of the United States, and others who have similar experience and expertise in rulemaking and regulatory reviews with respect to the other members of the Commission. The Speaker and Minority Leader of the House as well as the Majority Leader and Minority Leader of the Senate must present a list of candidates for the President's consideration. The President must ap-

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[144] GAO REPORT, *supra* note 13, at 7.
[145] *Id.*
[146] *Id.*
[147] Marlo Lewis, *Reviving Regulatory Reform: Options for the President and Congress,* COMPETITIVE ENTERPRISE INSTITUTE (Dec. 2004) 84, http://cei.org/pdf/4446.pdf.
[148] *Id.* at 3, 84.
[149] *Id.* at 75.
[150] *Id.* at 82.

point two members from each list, but may request a new list upon certification that candidates are not individuals with "expertise and experience in rule making affairs."

Subsection (c) specifies the powers and authorities of the Commission. In particular, the Commission must hold at least two public meetings a year. All additional hearings must be held in public. The Commission is authorized to have access to information in any Federal department or agency and such department and agency are required to supply such information upon request of the Commission chair. The Commission is also authorized to issue subpoenas to anyone in the United States to compel attendance and to supply information at any designated place within the United States. The Commission may apply to the district court for an order to enforce compliance with civil contempt.

Subsection (d) sets forth various administrative details, such as the amount of compensation to be paid to Commission members, their staff, and travel expenses.

Subsections (e) and (f) respectively provide for the appointment of a staff director for the Commission and staff. In addition, subsection (f) permits the Commission to accept employees from other Federal departments and agencies as detailees and requires the Government Accountability Office (GAO) and Office of Information and Regulatory Affairs (OIRA) to provide assistance to the Commission. Finally, subsection (f) requires other entities, such as Congress, the states, municipalities, and others to provide assistance to the Commission, including the detailing of employees.

Subsection (g) authorizes the Commission to retain experts and consultants as well as to lease space and acquire personal property.

Subsection (h) specifies the Commission's duties. Specifically, the Commission must review the Code of Federal Regulations to identify "rules and sets of rules that collectively implement a regulatory program that should be repealed to lower the cost of regulation to the economy." Although the Commission must prioritize major rules, this review would also include any rules that have been in effect for more than 15 years, impose paperwork burdens, or impose disproportionately high costs on small businesses, or could be strengthened in their effectiveness while reducing regulatory costs. The Commission must set a goal of reducing 15% of the cumulative cost of Federal regulation with a "minimal reduction in the overall effectiveness of such regulation." Additional criteria for review are the following:

(1) whether the rule's original purpose has been achieved and whether its repeal or amendment would not lead to significant recurrence of adverse effects or conduct that the rule was intended to prevent or reduce;

(2) whether the implementation, compliance, administration, enforcement or other costs of the rule "are not justified by the benefits to society;"

(3) whether the rule is unnecessary, obsolete in light of technological developments, economic conditions, market practices or other relevant factors given the passage of time since the rule was promulgated;

(4) whether the rule or is ineffective at achieving its purpose

(5) whether the rule overlaps, duplicates, or conflicts with other Federal rules, or state or local governmental rules;

(6) whether the rule has excessive compliance costs or is otherwise excessively burdensome as compared to certain specified alternatives; including alternatives that could substantially lower costs without significantly undermining effectiveness.

(7) whether the rule inhibits innovation or growth of the Nation's economy;

(8) whether the rule harms competition within the Nation's economy or international economic competitiveness of companies based in the United States;

(9) any other criteria as the Commission devises to eliminate or reduce unnecessarily burdensome costs to the Nation's economy.

The Commission must establish a methodology for conducting its review, identifying rules for consideration, and classifying rules. The terms of its methodology must be published in the Federal Register and on the Commission's website. With respect to classification, the Commission must recommend whether the rule's repeal would require immediate action or should be eligible for the regulatory cut-go procedures later described in the bill. In addition, the Commission must recommend whether the rule should be repealed. The Commission's decision to identify and classify rules are determined by a simple majority vote.

The Commission must also conduct a review and classify any rule submitted by the President, a Member of Congress, an officer or employee of any Federal, state or local governmental entity, or any member of the public. The submission must include a "statement of evidence" to demonstrate that the rule should be considered by the Commission.

Subsection (i) requires the Commission to publish in the Federal Register and on its website notices of all of its public meetings and classifications as well as reports summarizing such meetings and classifications. In addition, the Commission must submit periodic reports to Congress detailing its activities as well as a final report to Congress identifying all rules the Commission classified for repeal or repeal under the cut-go procedures. Further, the Commission must make available on its website all submissions received within 1 week.

Subsection (j) requires the agency with authority to repeal a rule identified for immediate action to repeal within 60 days or through regulatory cut-go after the enactment of a joint resolution by Congress approving the recommendations of the Commission's report.

An agency that has repealed a rule following a joint resolution or through regulatory cut-go under title II cannot issue a new rule that is "substantially similar" to the rule that it repealed. Additionally, agencies must ensure that new rules do not "result in the same adverse effects of the repealed rule" as established through the Commission's criteria.

Funding for the Commission is not to exceed $30 million. The Commission Chair is required to consult with the OMB Director before making requests for agency funds.

Title II—Regulatory Cut-Go

Sec. 201. Cut-Go Procedures. Section 201(a) requires an agency, before it promulgates a new rule, to repeal rules that the Commission has classified to be repealed so that the annual cost of the new rule to the U.S. economy is offset by the repeal of the current rule.

An agency may also preemptively repeal such rules identified by the Commission, or offset the costs of a new rule by repealing a rule listed in the Commission's report, but must achieve a net reduction in any cost imposed by the agency's rules, which may require repealing additional rules of the agency listed in the Commission report.

Sec. 202. Applicability. Once the agency has repealed all the rules identified by the Commission, then it no longer needs to go through the offset process.

Sec. 203. OIRA Certification of Cost-Benefit Calculations. The OIRA Administrator must review and certify the accuracy of agency determinations of the costs of new rules issued under section 201. Such certification must be included in the administrative record of the relevant rulemaking by the agency promulgating the rule and submitted to Congress.

Title III—Retrospective Review of New Rules

Sec. 301. Plan for Future Review. Section 301 requires the agency, when promulgating a final rule, to include a plan providing for the review of such rule not later than 10 years after the date on when such rule is promulgated. The review must be substantially similar to the review required under section 101(h) of the bill. For non-major rules, the agency's plan must include procedures and standards to enable the agency to determine whether to eliminate unnecessary regulatory costs to the economy. When feasible, the agency must include a proposed plan for review of a proposed rule in its notice of proposed rulemaking and receive public comment on the plan.

Title IV—Judicial Review

Sec. 401. Judicial Review. Section 401 makes agency compliance for immediate repeals and cut-go repeals are subject to judicial review under chapter 7 of title 5 of the U.S. Code.

Title V—Miscellaneous Provisions

Sec. 501. Definitions. Section 501 sets forth various definitions. For example, it defines "agency" to include independent agencies. With respect to major rules, it employs a similar, but different definition for that term as used in the Congressional Review Act.

Sec. 502. Effective Date. Section 502 sets forth the effective date as the date of enactment.

CONCLUSION

H.R. 1155 threatens to drown agencies in additional layers of red-tape and make it nearly impossible to establish any new rule, no matter how pressing, or issue any guidance on existing rules. By requiring every agency to assess the costs of new rules or informal guidance and tasking the Office of Information and Regulatory Affairs (OIRA) with certifying each of these assessments, the SCRUB Act would waste untold resources and water-down existing oversight of Federal rulemaking. In addition, the bills unworkable cut-go mandate would force agencies to make a dangerous false choice between preserving existing rules or implementing new rules to respond to emerging threats.

In principle, retrospective review of existing regulations is not without merit. It is hard to argue against the notion that agencies should periodically assess whether the rules they have promulgated could be improved or rescinded in light of changing circumstances. However, rather than streamlining rulemaking or eliminating unnecessary rules through a thoughtful retrospective review process, this bill would result in years of delays by requiring a new rulemaking process for any rule eliminated. Further yet, there are already myriad tools available for each branch of government to conduct effective oversight and make smart regulatory cuts that do not threaten the public health or safety. In sum, this legislation's meat-cleaver approach is an unnecessary, dangerous, and unbalanced attempt to derail agencies' missions to protect the public health and safety.

For the foregoing reasons, we strongly oppose H.R. 1155 and we urge our colleagues to join us in opposition.

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