Regulatory 'Pay Go'

Rationing the Public Interest

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Introduction

Attacks on regulation have become commonplace in Washington, D.C., and on the campaign trail. Advanced by conservative politicians and industry advocates, these attacks claim that regulations protecting worker safety, product safety, the food supply, the environment, and more are overly burdensome on industry. Regulatory opponents argue that such environmental, health, and safety protections should be rolled back, and that more obstacles should be added to the regulatory process so that future regulations are more difficult to adopt. With this latter idea in mind, regulatory opponents in Congress have sought to translate their attacks on regulation into legislative proposals that, if enacted, would subvert the process by which regulatory agencies carry out their statutory mission of developing and implementing rules. The narrative—not to be mistaken for fact—underlying virtually all of these proposals, including the Regulatory Accountability Act, the Regulations from the Executive in Need of Scrutiny (REINS) Act, and the Regulatory Freeze for Jobs Act, is that a large-scale rollback of regulations protecting public health and the environment is vital to the nation's economic recovery.

One of these anti-regulatory proposals, "regulatory pay-go," embraced by Republican presidential nominee Mitt Romney, relies on a gimmick: It would prohibit agencies from issuing new rules, no matter how beneficial they are, unless they first identify and eliminate an existing rule that involves greater or equal costs for industry. Regulatory pay-go thus creates an overall regulatory "budget," and by placing an arbitrary cap on new safeguards, it seeks to keep that budget of total regulatory costs from growing, without regard to the hazards from which those regulations protect Americans.

This CPR Issue Alert examines regulatory pay-go in greater detail, finding that it would further undermine the U.S. regulatory system's capacity to protect people and the environment while doing nothing to improve the economy. The proposal is based on a dogmatic assumption that social benefits from regulation cannot possibly justify any increase in overall regulatory costs. Supporters of regulatory pay-go have not and cannot provide empirical support for this categorical assumption that ignores a long history of regulations saving lives, preventing injuries, and protecting property and the environment. Among its many implementation problems, regulatory pay-go would operate as a one-way ratchet, gradually reducing safeguards over time, and it would add to the already massive procedural obstacles agencies must overcome to continue protecting people and the environment against new and emerging threats. If adopted as an executive order, it would be illegal. If adopted as legislation, it would create a litigation nightmare.

Regulatory pay-go is so fundamentally flawed that it cannot be regarded as a serious policy proposal, and it is unlikely its supporters intend it as such. Instead, these flaws suggest that regulatory pay-go 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. Regulatory pay-go, like other recent proposals designed to make regulations harder to promulgate, impedes meaningful discussion by policymakers and the public about the real problem with our nation's regulatory system—that inadequate resources, outdated law, and political interference is preventing agencies from carrying out their mission of safeguarding people and the environment against unreasonable risks.

Although Governor Romney has offered few specifics about his announced plan to overhaul[1] the nation's regulatory system, he has embraced the regulatory pay-go proposal. Indeed, Governor Romney promises that, if elected, he will issue an executive order mandating regulatory pay-go on his first day in office.[2] Sen. Mark Warner, a conservative Democrat from Virginia, has also announced at various times in the past his intention to introduce legislation that would establish regulatory pay-go.[3] Neither Governor Romney nor Senator Warner has provided many specifics about their respective regulatory pay-go proposals, but both programs appear to follow the same general outline. The only clear difference between the two proposals is that Governor Romney's would be established by executive order while Senator Warner's would be established through legislation.

Putting a Cap on Regulatory Success

Over the past four decades, U.S. regulatory agencies have achieved remarkable success in establishing safeguards that protect people and the environment against unreasonable risks. During the 1960s and 1970s, rivers caught fire, cars exploded on rear impact, workers breathing benzene contracted liver cancer, and chemical haze settled over the industrial zones of the nation's cities and towns. But today, the most visible manifestations of these threats are under control, millions of people have been protected from death and debilitating injury, and environmental degradation has been slowed and even reversed in some cases. In short, the United States is much better off because of the regulations adopted over the past 40 years. But serious hazards remain, and indeed new ones continue to emerge as new technologies develop and the U.S. economy evolves. Americans would be even better protected if the gaps that leave them and their environment vulnerable to unnecessary risks were closed.

To gauge the positive impact of regulation on Americans' lives, consider:

- The White House Office of Management and Budget (OMB) estimates that regulatory benefits exceed regulatory costs by 7 to 1 for significant regulations.[4] The Environmental Protection Agency (EPA) estimates that the regulatory benefit of the Clean Air Act exceeds its costs by a 25-to-1 ratio.[5] A study of rules issued by the EPA during the Obama Administration found that their regulatory benefits exceeded costs by a ratio as high as 22 to 1.[6]

- The failure to regulate some hazards related to the workplace, the environment, product safety, food safety, and more, and the failure to enforce existing regulations on such hazards results in thousands of deaths, tens of thousands of injuries, and billions of dollars in economic damages every year. Sometimes, the damages are spectacular on a world-wide scale. The BP Oil Spill caused tens of billions of dollars in damages.[7] The Wall Street collapse may have caused trillions. Regulation to prevent catastrophe can be far cheaper, and less painful, than cleaning up damage to lives, property, and the environment later.[8]

- Dozens of retrospective evaluations of regulations by the EPA and the Occupational Safety and Health Administration (OSHA) have found that the regulations were still necessary and that they did not produce significant job losses or have adverse economic impacts for affected industries, including small businesses.[9]

A History of Regulatory Successes

- EPA Clean Air Act rules saved 164,300 adult lives in 2010, and will save 237,000 lives annually by 2020.
- The National Highway Traffic Safety Administration's vehicle safety standards have reduced the traffic fatality rate from nearly 3.5 fatalities per 100 million vehicle miles traveled in 1980 to 1.41 fatalities per 100 million vehicle miles traveled in 2006.
- An Endangered Species Act recovery program developed by the U.S. Fish and Wildlife Service helped increase the Bald Eagle population from just 400 nesting pairs in 1963 to 10,000 nesting pairs in 2007, enabling the Service to remove Bald Eagles from the Endangered Species List.

Source: Sid Shapiro et al., *Saving Lives, Preserving the Environment, Growing the Economy: The Truth About Regulation* 5-6 (Ctr. for Progressive Reform, White Paper 1109, 2011), *available at* http://www.progressivereform.org/articles/RegBenefits_1109.pdf.

Proponents of regulatory pay-go appear to take this successful record for granted and conveniently ignore the facts. Many of the safeguards we enjoy today might never have been established if regulatory pay-go had been in place at the time the regulations were adopted. The institution of regulatory pay-go now would prevent agencies from responding to existing and emerging risks to the American people.

Capping Regulatory Costs Won't Cap Harmful Activities

Regulatory pay-go would prohibit agencies, including the EPA and OSHA, from taking any actions that add new regulatory costs without offsetting those costs by eliminating existing regulations. If the EPA, OSHA, or any other agency sought to regulate a harmful activity, it would have to drop an existing protection against some other risk. Alternatively, the agency could choose not to act, and leave the existing safeguard in place, at the price of leaving some other hazard unaddressed. In either case, people and the environment would be left unprotected against an identifiable and preventable risk.

Regulatory pay-go does not, however, impose a parallel cap on regulated industries' "budget" for causing harm. Imagine that industrial-scale farms begin using a new toxic pesticide that is uniquely harmful to the environment. Even though this activity increases the total amount of harm imposed on society, no industry—including the agriculture industry itself—would have to account for this increased harm by taking offsetting steps to reduce other harms caused by its activities. For example, industrial-scale farms would not have to offset their increased pesticide harms by reducing the risk of accidental injuries among their workers or by taking steps to curb their nonpoint source water pollution. In short, while regulators would be expected to "pay" for new protections by eliminating older ones, industry would not be required to "pay" for new hazards it creates by eliminating anything.

Although the U.S. regulatory system has succeeded in addressing many environmental, health, and safety risks, new risks continue to emerge as the U.S. economy evolves and technologies advance:

> <u>Imported foods</u>. About 17 percent of the American diet consists of imported food, from 190,000 production facilities around the world, and this number is growing.[10] Increasingly, we get our food (seafood, produce, and canned and packaged items) from China and other countries in Southeast Asia and from Chile and other Latin American countries, many of which have been shown to have major weaknesses in their food safety regimes. Acting under the recently passed Food Safety Modernization Act, the Food and Drug Administration (FDA) is just now beginning to take steps to address imported food safety, including developing a rule to establish a third-party verification system for foreign food suppliers.
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> <u>Fracking</u>. About a half-million natural gas wells are now operating in the United States, of which roughly 90 percent employ fracking[11], a process by which thousands—or even millions—of gallons of water are combined with a secret mixture of toxic chemicals and thrust underground to smash apart shale deposits, releasing the traces of natural gas they contain. Energy experts expect the number of fracking operations to continue growing rapidly, despite growing controversies over fracking's environmental, health, and safety impacts. The risks associated with fracking include water pollution, air pollution, hazardous working conditions for fracking workers, and even increased incidence of potentially destructive earthquakes. Current regulatory oversight for many of these risks is insufficient, incoherent, and in some cases non-existent.
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> <u>Nanotechnology</u>. Over the next decade, the nanotechnology industry is projected to employ millions of people and generate products worth trillions of dollars.[12] Nanotechnology involves the use and manipulation of nature's basic building blocks—atoms and molecules—to manufacture new products or materials. Because of its revolutionary nature, nanotechnology carries substantial risks, and its health and environmental impacts remain poorly understood, even as the development and use of nanotechnologies continues to barrel ahead. For example, early research indicates that some nanotechnologies exhibit human health and environmental hazards that are similar to those of asbestos or toxic metals.[13] Oversight of nanotechnology remains limited,

though several federal agencies, including the Consumer Product Safety Commission (CPSC), the FDA, and the EPA, could eventually play a role in regulating its use.

Even 10 years ago, few could have predicted the nature and scope of these regulatory challenges, just as today we are unable to predict the greatest regulatory challenges we will face 10 years from now. If regulatory pay-go becomes the law of the land, as regulatory agencies attempt to institute new safeguards addressing imported foods, fracking, nanotechnology, and other emerging risks, they will need to identify and eliminate existing and potentially unrelated regulations. For example, as it works to prevent the importation of Mexican green onions tainted with hepatitis A, the FDA might have to relax or eliminate regulations aimed at reducing the introduction of salmonella at U.S. peanut processing plants. Similarly, 10 years from now, the FDA's standard for imported green onions may have to give way for another rule to address the next big food safety threat.

Regulatory Pay-Go Disregards Regulatory Benefits

Under standard economic theory, a rule that creates more benefits than costs is a "good deal" for society, and a rule that creates fewer benefits than costs is not. Administrations from both parties have implemented this insight by requiring executive agencies to subject their biggest rules to a technical form of cost-benefit analysis to the extent permitted by their authorizing statutes. The use of cost-benefit analysis in regulatory decision-making is problematic in part because it treats the protection of individuals and the environment as just another asset that is worthy of protection only if the "value" of human beings or the environment is greater than the cost of protection. More broadly, cost-benefit analysis in practice cannot give due weight to qualitative benefits that it inevitably commodifies. Still, cost-benefit analysis does attempt to give bureaucratic expression to the idea, which underlies all voluntary exchange, that it makes sense to give up something of less value in trade for something of greater value.

Regulatory pay-go completely ignores this lesson, and thus is even more extreme than cost-benefit analysis in its disregard for regulatory benefits. For example, suppose a cost-benefit analysis determines that a rule will cost $100 million to implement but will yield $200 billion in benefits. Regulatory pay-go would block adoption of this rule—even though it is a huge net plus for society—unless the agency finds a different rule to repeal that costs $100 million or more to implement. Under regulatory pay-go, it is irrelevant that the repealed rule might be on an entirely different subject matter or that it might also generate far more benefits than costs. Regulatory pay-go thus seems to presuppose that it would be a good idea to force the EPA to repeal a cost-beneficial rule limiting ozone emissions in order to have enough regulatory budget to adopt a cost-beneficial rule limiting particulate matter. This is rather like cutting off the nose to benefit the face.

Conceptually, regulatory pay-go's refusal to consider the benefits generated by regulation can be understood as a manifestation of an anti-tax dogma. This dogma presupposes that taxes should not be increased because government taxing and spending robs the private sector of money it would invest in better ways that offer a greater economic return on investment than "wasteful" government programs. It is a common trope among anti-regulatory forces, notably including the

Romney campaign, that regulatory costs constitute a huge but hidden tax on the American economy. As no circumstances can justify raising taxes, no circumstances can justify raising the “tax” of regulatory costs.

To justify blocking adoption of cost-beneficial regulations, supporters of the proposal seem to assume that any additional money spent on obtaining regulatory benefits could be put to better use by the private sector. Of course, regulatory pay-go proponents have not presented any evidence to support the assumption that any additional dollar spent on safeguards represents a poor investment compared to what the private sector offers. Instead, not surprisingly, they seem eager to leave this assumption unstated in order to hide regulatory pay-go’s real implications from the public—namely, that regulatory pay-go constitutes an abdication of the government’s responsibility to safeguard people and the environment against unreasonable risks.

The treatment of government regulation as just another investment decision misses the moral significance of protecting individuals from premature death, injury, and disease or the environment from being despoiled and destroyed. The value of saving a human life, protecting a child against cancer, or avoiding the extinction of animal or plants species critical to the healthy functioning of an ecosystem cannot be fully captured in terms of dollars and cents. While some proponents of cost-benefit analysis simply ignore these moral implications, the proponents of regulatory pay-go are overtly hostile to them. Regulatory pay-go simply assumes that any incremental increase in overall regulatory costs cannot be justified by any moral or economic value. Regulatory pay-go supporters are prepared to cap the protections available from regulation at current levels.

Even if one accepts the risible assumption that no additional regulation is worthwhile, it is notable that pay-go supporters exempt costly and unjustified subsidies for fossil fuel extraction, mining, and agriculture from their proposal.[14] They are apparently willing to continue to add to these subsidies for government-selected industries, without subjecting them to the same assumption that private decisions about investments are always better than government decisions about investments. This selective focus on regulations suggests that a political agenda is the real impetus behind regulatory pay-go. If enacted, regulatory pay-go would provide billions of dollars in regulatory giveaways to politically well-connected corporate interests. But, the costs these wealthy corporations save—and then some—will be transferred to the general public in the form of premature death, preventable illness, and irreparable environmental damage.

Eliminating Safeguards Won’t Create Jobs or Help the Economy

Its supporters contend that regulatory pay-go is needed to clear out environmental, health, safety, and other regulations, which they claim slow economic growth and contribute to job losses. Economic theory and available data overwhelmingly refute this jobs-versus-regulations argument.

As with any type of spending, regulatory compliance generates economic activity. It is difficult to measure whether on balance job gains from this economic activity offset any job losses, but many studies examining this dynamic find either no net impact or, in some cases, an actual increase in employment.[15] Even some of the rules under development that face strong opposition from corporate interests and their allies in Congress are projected to generate net increases in employment. For example, a recent economic analysis found that the EPA's strict proposal to regulate coal ash waste would likely produce a net increase of 28,000 jobs.[16] Anti-regulation advocates, in the name of "job creation," oppose it.

That regulations should have a positive employment impact is not surprising. When a new rule goes into effect, firms often purchase new equipment and labor services to comply, which in turn leads to employment increases in those industries that provide the equipment or service. Regulations can even increase employment in those industries directly affected by helping firms become productive and more profitable. For example, when reviewing its cotton dust standard, OSHA found that that the rule had led the textile industry to modernize its facilities. The investments in new equipment increased the industry's productivity and profitability, enabling it to invest in additional job creation.

Furthermore, data from the U.S. Department of Labor Bureau of Labor Statistics (BLS) confirm that regulations have not been a significant cause of lost jobs in recent years. The BLS has developed an "extended mass layoff " data series, which examines the reasons why companies lay off 50 or more workers for more than 30 days. Since 2007, about 1.5 million workers per year have lost their jobs in such layoffs. Significantly, the data series is based on employer-supplied information. According to this information, an average of only 0.3 percent of workers laid-off in mass layoff events (about 4,500 in all) lost their jobs because of government regulations or intervention during the years 2007 to 2009.[17] (The same BLS data demonstrate that extreme weather events caused more extended mass layoffs.[18]) In other words, causes other than government regulations were responsible for 99.7 percent of job losses during the period for which data are available.

Significantly, *deregulation* is what has caused the bulk of job losses in recent years. The Wall Street collapse, the direct consequence of inadequately regulated banks and other financial institutions, is estimated to have killed more than 8.4 million jobs, leading to years of economic malaise and high unemployment rates.[19]

Since regulations are not stalling the economic recovery, even the Congressional Budget Office (CBO) has concluded that deregulatory policies, such as regulatory pay-go, will do nothing to address unemployment or spur economic growth. When testifying in a hearing before the Senate Budget Committee in October of 2011, CBO Director Douglas Elmendorf stated "[I]n CBO's judgment, the economic effects of the specific changes in regulatory policies or other policies apart from fiscal policies that are discussed in this testimony probably would be too small or would occur too slowly to significantly alter overall output or employment in the next two years."[20] Director Elmendorf went on to say that stopping proposed environmental regulations in particular might actually *lower* output and employment in the next two years, since these regulations would induce polluting industries to make investments in new capital and services. In contrast, with these regulations delayed, polluting industries would likely continue to sit on their massive cash reserves, depriving the economy of the kind of investment needed to spur a recovery.[21] The CBO thus concluded that deregulatory policies are not only unlikely to boost the economy; they may even backfire, dragging the economy down and worsening unemployment.

Regulatory Pay-Go is Rife with Implementation Problems

Regulatory pay-go prohibits agencies from issuing any new regulations unless they eliminate an existing rule of greater or equal cost, with the goal of preventing the total budget of regulatory costs from growing. In their zeal to provide regulatory relief for favored corporate interests, regulatory pay-go supporters have overlooked several potentially fatal implementation problems that plague the proposal.

Regulatory Pay-Go Would Function as a One-Way Ratchet, Reducing the Overall "Regulatory Budget" Over Time

The calculation of a rule's costs before it goes into effect is far from an exact science. Prospective cost estimates suffer from several methodological flaws that tend to systematically overstate the actual costs of regulation.[22] Several retrospective studies of regulatory costs have found that prospective estimates nearly always turned out to be too high.[23]

Regulatory pay-go does not take into account that prospective cost estimates systematically overstate regulatory costs, which will cause the total regulatory budget to shrink over time. Table 1 helps to illustrate how this process would occur. It assumes that prospective cost estimates overstate a regulation's costs by 10 percent on average. Thus, while Rule 1's real cost would be $100, the prospective estimate for the rule's cost would be $110 (*i.e.*, $100 multiplied by 1.1). After a few years, an agency prepares to issue Rule 2, which has a prospective cost estimate of $100. In order to clear space in the regulatory budget, the agency decides to eliminate Rule 1. Using a retrospective analysis, the agency finds that Rule 1's real cost is $100, and thus its elimination will satisfy regulatory pay-go requirements. Since prospective cost estimates generally overstate costs by about 10 percent, the real cost of Rule 2 is about $91 (*i.e.*, $100 divided by 1.1). Thus, just one application of regulatory pay-go would have reduced the total regulatory budget by about $9. This process will repeat itself if an agency eventually replaces Rule 2 with a Rule 3 that has a projected cost estimate of about $91. The real cost of Rule 3 will be about $83 (*i.e.*, $91 divided by 1.1), and once it is in place the total regulatory budget will be about $17 lower than where it started.

Table 1		
	Prospective Cost Estimate	Real Cost
Rule 1	$110	$100
Rule 2	$100	$91
Rule 3	$91	$83

Of course, the above hypothetical presumes each new rule has the same cost as the existing rule that it is replacing (or, to be more precise, the prospective cost estimate of each new rule is equal to the real cost of the rule that it is replacing). In reality, such perfectly equivalent exchanges between existing and new rules would almost never take place, and this could introduce another mechanism for ratcheting down the total regulatory budget over time. Under a more likely scenario, the EPA might seek to institute a new rule that has a prospective cost estimate of $60 million. The EPA might find that its best option for an existing rule to eliminate is one that imposes a cost of $70 million. The supporters of regulatory pay-go do not explain what would happen to that leftover $10 million. The EPA might be able to "bank" that $10 million and apply it to a future regulation. Alternatively, the total regulatory budget might be permanently reduced by $10 million. Under this alternative, the public would enjoy fewer safeguards, while corporate interests would literally get to "keep the change" in the form of regulatory relief.

The Creation of New Agencies or Reorganization of Existing Agencies Would Challenge the Implementation of Regulatory Pay-Go

Another question that proponents of regulatory pay-go have not considered is whether they would establish a single administration-wide budget or if each agency would operate under a separate regulatory budget. The resolution of this question would in turn help determine how the concept of a regulatory budget would be adapted to allow for the introduction of new agencies or efforts to reorganize existing ones.

> New agencies. Imagine if regulatory pay-go had been in place before Congress created the Consumer Financial Protection Bureau (CFPB), a new agency designed to prevent potentially harmful abuses by the financial services industry. If regulatory pay-go operated under a single administration-wide regulatory budget, then the first few regulations issued by the CFPB would likely have to displace an existing regulation from another agency, since the CFPB would start with a regulatory budget of $0. But which existing regulation from another agency would get cut? Proponents of regulatory pay-go have not explained the process by which such decisions would be made. These decisions will likely be contentious, since each agency will want to guard against any cuts to its regulatory budget. On the other hand, if each agency operated under a separate regulatory budget, then the CFPB would have to have its own regulatory budget constructed, presumably by cobbling together pieces of other agencies' budgets. This, too, would likely be a contentious process. Yet, proponents of regulatory pay-go have provided no explanation for how this process would be carried out or how they would determine the size of a new agency's budget.
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> Agency reorganization. Proposals for creating a single food safety agency have been floating around for decades. The proposals would combine some or all of the functions of the fifteen different agencies that play a role in food safety, including most notably the Food and Drug Administration (FDA) in the Department of Health and Human Services (HHS) and the Food Safety Inspection Service (FSIS) in the Department of Agriculture (USDA).[24] Creating a single food safety agency would likely be straightforward under a single administration-wide regulatory budget. In contrast, attempting this same reorganization would be considerably more complicated if agencies operated under separate regulatory budgets. For instance, the policymakers involved might have to decide which portion of the HHS's regulatory budget belongs to the FDA or which portion of the USDA's regulatory budget belongs to the FSIS in order to create a regulatory budget for the new food safety agency.

Regulatory Pay-Go as Illegal Executive Order or Incoherent Legislation

Agencies cannot simply eliminate existing rules by decree; instead, they must follow the standard notice-and-comment process established under the Administrative Procedure Act (APA), the law that governs federal rulemaking. Critically, an agency must articulate a rational policy reason for eliminating the rule that is both supported by the rulemaking record (*i.e.*, any analyses or reports the agency produces along with any public comments the agency receives) and consistent with any applicable law.

Governor Romney's proposed regulatory pay-go program, which he says he would create by executive order, would almost certainly violate APA rulemaking procedures. Under such a program, an agency would likely lack a rational policy basis to support its proposal to eliminate an existing rule, except for the need to clear space in the regulatory budget so that a new rule could be instituted in its place. Executive orders lack the force of law and thus cannot provide agencies with legal authority to eliminate rules mandated by other laws. Without this legal support, most rulemaking actions to eliminate existing rules likely would not survive judicial review.

Even Senator Warner's proposal, which would create regulatory pay-go legislatively, is at risk of running afoul of the APA. A regulatory pay-go law would provide agencies with legal authority to eliminate rules mandated by other laws, but the APA would still require that rulemaking actions to eliminate existing rules have a rational basis that is supported by the rulemaking record. How a court might apply "arbitrary and capricious" review in these cases is unclear. At the very least, the agency would likely have to make some showing that the rule being eliminated is no longer needed to achieve the objectives of the statute under which it was issued. A reviewing court might also require that an agency show that it had considered other rules before choosing one to eliminate.

Regulatory Pay-Go Doubles the Ossification Problem

The combination of increasingly complex rulemaking procedures and insufficient resources already prevents the EPA, OSHA, and other regulatory agencies from effectively carrying out their statutory missions by issuing needed rules in a timely fashion. The new rulemaking procedures created by regulatory pay-go would make this troubling situation even worse.

Because the APA requires agencies to follow notice-and-comment procedures before eliminating existing rules, regulatory pay-go effectively doubles much of the work that an agency must undertake in order to issue a new rule. Agencies would likely combine the two actions into a single rulemaking or undertake the two rulemaking actions simultaneously, but the time and resources this would save would probably be marginal. Agencies would still have to prepare two proposals, review public comments for both proposals, and amend both proposals as necessary to respond to the public comments. In this time of fiscal restraint, Congress is unlikely to provide agencies with increased funding to carry out these additional tasks, which will prevent agencies from implementing regulatory pay-go effectively and in a timely manner.

Promoting the Public Interest: A Vibrant Regulatory System

Supporters of regulatory pay-go are right about one thing: the U.S. regulatory system is not promoting the public interest as well as it should be. But their diagnosis of the problem could not be farther from the mark, and their proposed solution is transparently calculated to sacrifice safeguards for health, safety, the environment and more on the altar of industry profit.

The regulatory system is supposed to protect people and the environment against unacceptable risks, but inadequate resources and excessive procedural constraints have prevented regulatory agencies from fulfilling this task in a timely and effective manner. Evidence of inadequate regulation and enforcement abounds—from the BP oil spill in the Gulf of Mexico to the Upper Big Branch Mine disaster that claimed the lives of 29 men, from the decaying natural gas pipeline networks running beneath our homes to the growing risk of imported food tainted with salmonella, botulism, or other contaminants showing up on grocery store shelves. It was inadequate regulation of the financial services industry that triggered the current economic recession and left millions unemployed, financially ruined, or both.

The regulatory system can and should be reenergized. Congress needs to work with the president to identify the resources that agencies need to carry out their statutory missions, including the development, implementation, and enforcement of regulations. In addition, Congress and the President each need to identify any unnecessary analytical requirements and procedural constraints that prevent agencies from issuing effective rules in a timely manner. Taking these steps will not be simple, but without them, the U.S. regulatory system will continue to operate in an ad hoc, reactionary fashion, leaving public health, safety, and environmental protection to the whims of the marketplace.

Endnotes

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[14] *See* Lisa Heinzerling, *Five-Hundred Life-Saving Interventions and Their Misuse in the Debate over Regulatory Reform*, 13 RISK 151, 162 (2002).
[15] *See* Isaac Shapiro & John Irons, *Regulation, Employment & and the Economy: Fears of Job Loss Are Overblown* (Envtl. Pol'y Inst., Briefing Paper No. 305, 2011) (summarizing the evidence), *available at* http://epi.3cdn.net/961032cb78e895dfd5_k6m6bh42p.pdf; Frank Ackerman & Rachel Massey, *Prospering with Precaution: Employment, Economics, and the Precautionary Principle* (Global Dev. & Env't Inst., Working Paper, 2002) (same), *available at* http://www.healthytomorrow.org/attachments/prosper.pdf.
[16] FRANK ACKERMAN, EMPLOYMENT EFFECTS OF COAL ASH REGULATION (Stockholm Environment Institute – U.S. Center, Tufts University, 2011), *available at* http://sei-us.org/Publications_PDF/Ackerman-coal-ash-jobs-Oct2011.pdf. While higher electricity prices caused by the regulation would lead to some job losses, these losses are

more than offset by the job gains that would result from the expenditures by industry to come into compliance with the strict standard. In particular, coal-fired power plants would need to spend money on waste management, wastewater treatment, and construction and operation of facilities and equipment—all of which are labor-intensive activities and would generate significant increases in employment.

[17] Shapiro & Irons, *supra* note 15, at 20.

[18] *Regulations Do Not Hinder U.S. Job Market, Paper Finds*, OMB WATCH, http://www.ombwatch.org/node/11615 (last visited Aug. 6, 2012).

[19] Heidi Shierholz, *Unemployment Drops to 9.7% Despite More Job Losses*, ECON. POL'Y INSTITUTE, Feb. 5, 2010, http://www.epi.org/publications/entry/jobs_picture_20100205/ (last visited Sept. 24, 2012).

[20] *Policies for Increasing Economic Growth and Employment in 2012 and 2013: Hearing Before the S. Comm. on the Budget*, 112th Cong. 4 (2011) (statement of Douglas W. Elmendorf, Director, Congressional Budget Office), *available at* http://www.cbo.gov/sites/default/files/cbofiles/attachments/11-15-Outlook_Stimulus_Testimony.pdf.

[21] *Id*. at 49.

[22] For more on the causes of overestimation of regulatory costs, see Thomas O. McGarity & Ruth Ruttenberg, *Counting the Cost of Health, Safety, and Environmental Regulation*, 80 TEX. L. REV. 1997, 2011, 2044-50 (2002).

[23] *See* SIDNEY A. SHAPIRO & ROBERT L. GLICKSMAN, RISK REGULATION AT RISK: RESTORING A PRAGMATIC APPROACH 107 (2003) (Table 6.1).

[24] *See, e.g.*, Marion Nestle, *Rumor: A Single Food Safety Agency at Long Last?*, FOOD POLITICS, Jan. 17, 2012, http://www.foodpolitics.com/2012/01/rumor-a-single-food-safety-agency-at-long-last/ (last visited Sept. 24, 2012).

About the Center for Progressive Reform

Founded in 2002, the Center for Progressive Reform is a 501(c)(3) nonprofit research and educational organization comprising a network of scholars across the nation dedicated to protecting health, safety, and the environment through analysis and commentary. CPR believes sensible safeguards in these areas serve important shared values, including doing the best we can to prevent harm to people and the environment, distributing environmental harms and benefits fairly, and protecting the earth for future generations. CPR rejects the view that the economic efficiency of private markets should be the only value used to guide government action. Rather, CPR supports thoughtful government action and reform to advance the well-being of human life and the environment. Additionally, CPR believes people play a crucial role in ensuring both private and public sector decisions that result in improved protection of consumers, public health and safety, and the environment. Accordingly, CPR supports ready public access to the courts, enhanced public participation, and improved public access to information. CPR is grateful to the Public Welfare Foundation for funding this Issue Alert.

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