

*Protecting People and the
Environment by the
Stroke of a Presidential Pen*

*Seven New Executive Orders for
President Obama's Second Term*

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Introduction

Over the next four years, the nation will face a daunting to-do list of public health, safety, and environmental challenges. From the myriad toxic chemicals that endanger children's health to the threat of imported food tainted with salmonella, botulism, or other contaminants showing up on grocery store shelves; from the hazardous conditions in which some of this country's most vulnerable workers must toil to the seemingly intractable epidemic of asthma that continues to afflict millions of U.S. youth—the problems are severe and demand effective and timely public policy solutions. Of course, at the very top of the to-do list is mitigating and adapting to climate change, a challenge that, in terms of magnitude and complexity, is unlike any the nation has faced before.

If progress is to be made on these challenges, the Executive Branch must take the lead. Despite Congress's historically low public approval ratings, the recent elections left the balance of power in Congress changed only around the edges. Anti-regulation conservatives retain a majority in the House of Representatives and enough votes to slow down or block practically any bill they choose in the Senate. A legislative response to any of the urgent public health, safety, and environmental challenges is unlikely to appear on the horizon any time soon.

President Barack Obama has broad authority over the Executive Branch's various regulatory agencies, including the Environmental Protection Agency (EPA), the Food and Drug Administration (FDA), and the Occupational Safety and Health Administration (OSHA). Existing statutes authorize these agencies and the White House itself to address the greatest public, health, and safety challenges. So if progress is to be made, President Obama will need to unleash this potential by making full use of his authority to manage agency activities by issuing Executive Orders. He can use these orders to direct the agencies to focus on high priority regulatory initiatives and to streamline the processes by which they carry out their statutory missions.

This CPR Issue Alert recommends seven Executive Orders for the second term of the Obama Administration, all of which are directed at addressing critical public health, safety, and environmental challenges. Each Order directs government agencies to take specific steps to create meaningful new safeguards for people and the environment. Adopting and successfully carrying out these recommendations would help to cement President Obama's legacy as a strong defender of public health, safety, and the environment.

- **Executive Order to Take Action on Climate Change Mitigation.** This Order would set a detailed regulatory agenda directing the EPA to fulfill its obligations under the Clean Air Act to regulate greenhouse gas emissions from major industrial sources. The Order would instruct the EPA to finalize its proposed standards for new or modified power plants and oil refineries, and most crucially, to develop standards for a variety of

existing sources—all within stated deadlines that would signal the Administration’s commitment to timely, unimpeded progress.

- **Executive Order to Prioritize and Coordinate Planning for Climate Change Adaptation.** This Order would require agencies to consider how climate change will affect their proposed and ongoing activities and to design their actions in ways that ease, rather than exacerbate, the challenges faced by communities and ecosystems. So, for example, agencies involved in setting policy for coastal development, including federal flood insurance, should develop new rules that discourage building in areas likely to be overcome by sea-level rise. Agencies concerned with ecosystem preservation should consider whether moving species north could protect them as temperatures increase.
- **Executive Order to Avoid Dangerous Imports.** This Order would create a Cabinet-level Working Group to address the cross-cutting problems posed by imported foods, drugs, and consumer products, focusing primarily on ways to hold importers accountable for verifying the safety of their suppliers’ products and to expand enforcement authority over foreign companies. Under the Order, the Working Group would also study the value and feasibility of other options, such as requiring agencies to pre-approve the equivalence of foreign safety systems, addressing the obstacles to reform presented by trade agreements, and improving coordination among the agencies.
- **Executive Order to Protect the Health and Safety of Children and Future Generations.** This Order would charge an interagency Task Force with developing and carrying out an affirmative agenda of coordinated regulatory actions to address high priority threats to the health and safety of children and future generations. The agenda setting process would be iterative, and the first iteration would address children’s workplace health and safety, asthma, toxic chemicals, and climate change.
- **Executive Order to Protect Contingent Workers.** This Order would tailor OSHA’s existing enforcement and voluntary consultation programs to better account for the unique occupational safety and health challenges that contingent workers face. Contingent workers are a growing subset of the labor force, and include, for example, construction and farming day laborers, warehouse laborers hired through staffing agencies, and hotel housekeepers supplied by temp firms. Though “contingent work” is not easily defined, from a worker’s perspective, the most salient characteristic of contingent work is the absence of an express or implied contract for long-term employment. The Order would also establish an affirmative regulatory agenda to protect contingent workers against musculoskeletal injuries and expand OSHA’s cooperation efforts with the foreign consulates for countries that have large numbers of their nationals employed as contingent workers in the United States.
- **Executive Order to Reform OIRA’s Role in the Regulatory System.** This Order would reorient OIRA’s role in the regulatory system so that it is aimed toward working proactively with agencies to help them achieve their statutory missions of protecting public health, safety, and the environment. This Order would rescind requirements for cost-benefit analysis, eschew review of minor rule makings, improve transparency, and charge OIRA with addressing the problem of regulatory delay.

- **Executive Order to Restore the SBA Office of Advocacy’s Focus on Small Businesses.** This Order would direct the Small Business Administration’s (SBA) Office of Advocacy to focus its rulemaking interventions so that they help truly small businesses—those with 20 or fewer employees—and to assist these truly small businesses participate more effectively in the rulemaking process. This Order would also revoke an existing Executive Order that directs the Office of Advocacy to work closely with OIRA.

Many of these recommended Executive Orders focus on developing and implementing new regulations, and President Obama can ensure their success by appointing an Administrator of the Office of Information and Regulatory Affairs (OIRA) who is committed to protecting public health, worker and consumer safety, and the environment. The OIRA Administrator is often referred to as the “regulatory czar,” and, as that name suggests, he or she has considerable influence over the degree to which agencies are able to issue new rules in a timely and effective manner. In the past, OIRA Administrators have operated as impediments to regulatory progress, pushing to block, delay, and dilute countless safeguards.

Taking Action on Climate Change Mitigation

Setting an Agenda for Reducing Greenhouse Gas Emissions

The 2012 presidential campaigns were disturbingly quiet on the issue of climate change; for the first time since 1984, the televised debates did not even broach the subject. This lack of political attention formed a sharp contrast with the year's record heat waves, droughts, wildfires, and severe weather events, culminating a week before the election in Hurricane Sandy, one of the largest and most destructive storms on record to affect the East Coast. While particular weather events cannot be clearly attributed to global warming, there is scientific consensus that climate change increases the likelihood or intensity of such events—a connection that is not lost on members of the public or their local and state government officials.¹

Mitigating the worst effects of climate change requires making significant reductions in emissions of greenhouse gases (GHGs). While the federal government made some progress on this front in President Obama's first term, some of the most significant and promising steps have yet to be taken. Because the U.S. Supreme Court held that GHGs constitute "air pollutants,"² and the Environmental Protection Agency (EPA) found that GHG emissions from motor vehicles "may reasonably be anticipated to endanger public health or welfare," the EPA is obligated under the Clean Air Act (CAA) to regulate GHG emissions from a variety of sources. Toward that end, the EPA has issued rules requiring new cars and light trucks to reach an average fuel economy of 35.5 mpg by model year 2016 and 54.5 mpg by model year 2025, with another rule applying to heavier trucks.

By contrast, the EPA has just begun regulating GHG emissions from "stationary sources" (*i.e.*, industrial facilities). In early 2011, the EPA first began incorporating the largest GHG emitters into the Prevention of Significant Deterioration (PSD) program, which requires large sources to obtain a state permit before building or upgrading facilities. And those efforts have survived an initial round of litigation. However, the EPA has not yet issued the federal minimum standards that are also required for some source categories under other provisions of the CAA. The agency proposed new source performance standards (NSPS) for GHGs emitted by new or modified power plants in April of 2012, but those standards have not yet been finalized. The EPA is also required to issue NSPS for oil refineries under a court settlement, but the proposed standard is almost one year overdue.

Section 111(d) of the CAA requires the EPA to establish procedures for submission of state plans to regulate GHG emissions from *existing* stationary sources as well, but the EPA has not even begun the process of addressing these sources.³ Fossil fuel combustion by stationary sources currently represents the largest share of GHG emissions in the U.S.;⁴ existing power plants account for 73 percent of all emissions from stationary sources, with oil refineries contributing another 6 percent.⁵ Together, existing power plants and refineries are responsible for 40 percent of all GHG pollution nationwide.⁶ Moreover, if GHG limits are imposed on new sources, but not existing ones, then companies will find it advantageous to keep operating older, heavily polluting facilities well beyond their anticipated useful life, instead of modifying them or building new cleaner facilities that would be subject to new source regulations. This

“grandfathering” of existing sources from meaningful regulation has long plagued CAA programs, particularly those that apply to high-polluting fossil fuel-fired power plants.

In his election-night victory speech, President Obama reignited hope for a proactive approach to climate change when he envisioned an America “that isn’t threatened by the destructive power of a warming planet.” Unfortunately, Congress, stymied by intense partisanship, is unlikely to enact legislative solutions to the climate change mitigation problem anytime soon. But that gridlock does not prevent federal agencies from making significant progress in President Obama’s second term, using the tools already available to them, and it does not preclude the President from requiring them to do so.

Solution by Executive Order

The President should sign an Executive Order that sets a specific regulatory agenda for the EPA, identifying and prioritizing the steps that the EPA must take to reduce GHG emissions, consistent with its obligations under the CAA and court settlements. The Executive Order should direct the EPA to develop a timeline within 90 days describing when it will: (1) finalize NSPS standards for new power plants and oil refineries, no later than 3 months from the date of the Order, (2) move forward on developing Section 111(d) limits for existing power plants and refineries, to be proposed within 6 months and finalized within 12 months, and (3) begin to address other major industrial sources of GHG emissions (new and existing) under Section 111, including chemical manufacturers, smelters, cement plants, and industrial boilers. To prioritize its efforts, the EPA should address these other sources in decreasing order of their relative contributions to total GHG emissions, proposing limits on the four heaviest-emitting source categories within 12 months, to be finalized within 18 months.

The Order should instruct the EPA to make its timeline available to the President as well as the public. While the deadlines stated in the Executive Order would not be legally enforceable, they would demonstrate the Administration’s commitment to a proactive regulatory agenda, signaling to industry, the agencies, and the public that the White House will not allow lobbying campaigns or administrative delays to derail the EPA’s mitigation efforts.

Prioritizing and Coordinating Planning for Climate Change Adaptation

Preparing for the Inevitable Effects of Climate Change

Effectively addressing climate change involves not only mitigating its intensity by reducing greenhouse gas emissions, but also planning for *adaptation* to those climate change impacts that have now become inevitable—from rising storm surges and more frequent droughts to amplified air pollution and spikes in diseases transmitted by food, water, and insects.⁷ President Obama took a step in the right direction during his first term by creating the Interagency Climate Change Adaptation Task Force, which has released two progress reports and instructed all agencies to prepare adaptation plans to be implemented in FY 2013.

Still, the current approaches suffer from a lack of clear commitment by some agencies to engage in adaptation planning and implementation, as well as from a lack of interagency coordination. Although a national adaptation strategy has been assumed in numerous official documents, and consistently recommended by eminent research groups, there is still none to speak of.⁸

Most agencies still view adaptation planning as a vaguely defined, long-term exercise that is divorced from their usual activities, instead of an integral part of their day-to-day decisionmaking processes. It was a similar reluctance by agencies to consider the impacts of their actions on the environment more generally that induced Congress to adopt the National Environmental Policy Act (NEPA) in 1970 to force agencies to integrate environmental considerations into their decisions. All agencies need to regard the pursuit of effective adjustment to climate change as an essential part of their statutory missions, rather than an obstacle to the achievement of desired goals or as a peripheral concern. Thus, for example, the General Services Administration (GSA) should consider whether a new government office building in a coastal zone would be vulnerable to sea level rise, and the Fish and Wildlife Service (FWS) should consider whether climate change could exacerbate the habitat loss expected to result from permitted land uses. Moreover, effective adaptation planning requires decisionmakers to update their climate predictions in light of new information and learn dynamically from the outcomes of previous efforts. The agencies currently lack mechanisms, however, for continuous evaluation and revision of their adaptation plans.⁹

Solution by Executive Order

The President should sign an Executive Order that will incorporate consideration of climate change effects into a variety of agency decisionmaking processes, as well as improve the coordination and quality of adaptation planning efforts.

Require Agencies to Conduct Climate Adaptation Assessments

The new Executive Order should direct agencies to take into account, in all aspects of planning and decisionmaking, the effects that future climate change may have on their activities. The President should oblige agencies to prepare “adaptation assessments” in which agencies, based on the best available science and in consultation with other agencies with relevant expertise, would analyze the anticipated nature, magnitude, and rate of climate change impacts that may

affect the ability of agency actions to achieve their intended purposes. Likewise, the Executive Order should require agencies to consider the extent to which their proposed actions may exacerbate climate change or heighten adaptation challenges. Additionally, the Order should require agencies to analyze available alternative methods of designing and implementing their actions so as to facilitate adjustment to climate change impacts. These obligations would be ongoing until project completion.

While the process of developing Environmental Impact Statements under NEPA provides agencies with a familiar model, it would be better for agencies to conduct adaptation assessments through a separate process that is more tailored to the needs of planning for climate change. First, a separate process would ensure that climate change effects do not get lost among all the other NEPA factors. Second, meaningful and effective adaptation planning requires an agency to monitor its predictions about climate change effects over time, something not accounted for in the typically one-shot NEPA evaluations, except in limited instances where supplementation of NEPA documents is required. Third, while the NEPA process is triggered only by proposed agency *actions*, and ongoing project implementation may not qualify, climate change adaptation often requires examining the status quo and modifying existing agency programs to avoid or lessen climate-related impacts. Thus, agencies should explore more diverse mechanisms for triggering an adaptation assessment, including citizen petitions and investigative reports.¹⁰

Integrate Adaptation Considerations into Species Management Decisions

Under the Endangered Species Act (ESA), the FWS and the National Marine Fisheries Service (NMFS) are responsible for listing “threatened” and “endangered” species, designating their critical habitats, and developing recovery plans for them. Under Section 7 of the law, both agencies consult with other federal agencies to ensure that their actions do not jeopardize the existence of any listed species or adversely modify critical habitat. The FWS and the NMFS are also responsible for administering and enforcing Sections 9 and 10, which protect species from private as well as government actions. Section 9 makes it unlawful for any person to “take” an endangered species, a term that encompasses a wide variety of harmful actions, including certain kinds of habitat modification. Section 10 allows both agencies to permit otherwise lawful actions resulting in “incidental takes” of listed species by approving habitat conservation plans (HCPs) that minimize and mitigate impacts on the listed species.

The President should require the FWS and the NMFS to consider climate change effects at all of these points, by (1) proactively listing species that will be threatened by climate change, (2) defining critical habitat with consideration of the anticipated impact of climate change on habitat crucial to survival or recovery, (3) building adaptation measures into recovery plans that will facilitate species recovery, (4) considering the effects of climate change in deciding whether an agency’s action puts a listed species in jeopardy and in suggesting reasonable and prudent alternatives, (5) deciding whether an activity that affects habitat, in combination with climate change effects, amounts to a prohibited “take,” and (6) requiring that HCPs include measures to anticipate and respond to climate change effects before the FWS or the NMFS will permit any “incidental take” activities.¹¹

Human adaptation efforts, such as moving development away from flood-prone areas or diverting water to mitigate the effects of drought, are also likely to affect species habitats.

Accordingly, the President should instruct the FWS and the NMFS to be attentive to any new or exacerbated threats posed by human adaptation, using their traditional tools (*e.g.*, agency consultations and enforcement of the “take prohibition”) to steer governments and private parties toward minimally destructive adaptation measures. In addition, both agencies are authorized under Section 10(j) of the ESA to engage in “assisted migration” to further the conservation of a listed species. The new Executive Order should direct both agencies to devise standards for deciding when to apply such a strategy to species threatened by climate change or human responses to it, taking into account the necessity of the migration, the likelihood of its success, the risks that it poses to other species and ecosystems, and the need for coordination with other land management agencies, state governments, or private landowners.¹²

A recent survey showed that parks and forest managers generally see the ESA as a hindrance to human adaptation and long-term species adjustment, due to its singular focus on recovering listed species in their current habitats.¹³ But by incorporating the effects of climate change at each step of their decisionmaking processes, the FWS and the NMFS can try to facilitate thoughtful, effective adaptation measures while still fulfilling their mandates to protect threatened and endangered species. Moreover, when confronting trade-offs where helping one species might harm another, both agencies should prioritize ecosystem preservation and long-term species diversity in all their planning and decisionmaking activities, within the bounds of their discretion.¹⁴

Enhance the Quality of Agency Adaptation Planning

The President should direct the Interagency Climate Change Adaptation Task Force to take additional measures to facilitate and coordinate the planning process, as well as improve the quality of the resulting plans and their integration with the plans of state and local officials.

First, the Task Force should develop an overarching national adaptation strategy that would clarify the roles and responsibilities of various entities, resolve cross-cutting policy issues, oversee resource needs, and set national priorities for adaptive actions. Second, the Task Force should develop interactive networks through which agencies can share data and lessons from their ongoing efforts. Third, given the inherent uncertainty in climate change predictions, the Task Force should require the agencies to periodically assess and reevaluate their adaptation plans, with clear thresholds for adjustment and incentives for monitoring.¹⁵

More substantively, the Task Force should instruct the agencies to plan a variety of strategies, both short-term and long-term, to promote the capacity at all levels of government to adapt to climate change. Borrowing from the FWS’ well-developed adaptation plan, short-term strategies should include: (1) *resisting* the effects of climate change, and (2) enhancing the *resilience* of societies and ecosystems to deal with effects that cannot be avoided. Long-term strategies should include: (3) *responding* to climate change by working *with* its effects, and (4) *realigning* already-disturbed human and natural environments to expected future conditions.¹⁶ Finally, the Task Force should advise the agencies to consider the relationship between mitigation and adaptation to enable them to avoid taking mitigation actions that are maladaptive or adaptation actions that exacerbate climate change.

Protecting America's Consumers from Dangerous Imports

Addressing Cross-Cutting Problems Posed by Imported Foods, Drugs, and Consumer Products

With the globalization of the world economy and the export of a large portion of the U.S. manufacturing footprint to developing countries that lack effective health and safety regulation, imported products and foods pose a growing threat to consumers here at home. Product exports from China and India alone are expected to increase by 400 percent before 2020.¹⁷ About 97 percent of the toys we buy are manufactured abroad, most in Southeast Asia.¹⁸ Imports account for 40 percent of our finished drugs and a whopping 80 percent of the active pharmaceutical ingredients in our drugs,¹⁹ as well as 15 percent of all foods we consume. Sixty percent of fruits and vegetables and 86 percent of seafood are imported.²⁰

Just this year, 546 people fell ill and 80 were hospitalized from eating imported foods contaminated with Salmonella (mangoes from Mexico and tuna from India)—and for every case of the illness reported, the Centers for Disease Control and Prevention (CDC) estimate 38.6 go unreported.²¹ In Vietnam, shrimp destined for the United States are kept cool with ice made from bacteria-infested tap water. In China, tilapia farmers routinely feed their fish on feces from pigs and geese.²² In Mexico, grape tomatoes and onions are irrigated with dirty water, contaminated by open-air latrines, and handled by workers who have no place to wash their hands after going to the bathroom.²³

Imports also present a heightened risk of intentional adulteration and fraud. For example, Chinese drug manufacturers substituted a synthetic material for the blood thinner heparin, triggering severe, sometimes fatal allergic reactions in American patients. American drug companies were unable to detect the adulteration because the synthetic material mimicked the chemical properties of heparin, even though it was 100 times less expensive to produce.

Responsibility for ensuring import safety is scattered over a number of Cabinet departments and agencies. The Food and Drug Administration (FDA) and the Department of Agriculture (USDA) have primary responsibility for food safety, but several other agencies are also involved. Drugs and medical devices are overseen by the FDA as well, while consumer products are the purview of the Consumer Product Safety Commission (CPSC). These fragmented efforts to regulate imports often suffer from ineffective coordination and resource shortfalls, as the Government Accountability Office (GAO) has pointed out in numerous reports. For example, in 2011, the FDA examined only 2.3 percent of all food import lines (*i.e.*, portions of shipments that represent a particular product type) and inspected only 0.4 percent of registered foreign food facilities. For consumer products, 19 CPSC port investigators were able to inspect just 0.05 percent of the import lines under their jurisdiction last year. The CPSC's budget for FY 2011 was \$118 million, an amount so clearly inadequate to support its regulatory mission of ensuring the safety of 15,000 product categories and billions of units that the agency is effectively paralyzed much of the time. Further complicating matters is the fact that any crackdown for safety reasons will inevitably trigger complaints to the Office of the U.S. Trade Representative and the State Department.

Recent laws, including the Food Safety Modernization Act (FSMA) and the Generic Drug User Fee Amendments of 2012 (GDUFA), promise substantial increases in inspections of foreign facilities. But even under Congress's most ambitious plans, the number of plants inspected would still represent only a small fraction of foreign manufacturers. Moreover, these reform efforts leave significant regulatory gaps in place; for instance, GDUFA does nothing to improve the safety of name-brand or over-the-counter medications manufactured overseas.²⁴

Solution by Executive Order

President Obama should sign an Executive Order creating a Cabinet-level Import Safety Working Group (Import Working Group) to address the cross-cutting issues that confront various agencies in their efforts. While a Food Safety Working Group has been in operation since 2009, its focus is both too narrow (only food, not drugs or consumer products) and too broad (covering the entire domestic food supply as well) to devote sufficient attention to the pervasive problems of imports. President George W. Bush convened an inter-agency working group on import safety back in 2007, but it spent only three months on the problem before issuing a report, and the project was abandoned after a brief progress update in 2008.

First, the President should direct the Import Working Group to (1) develop any draft legislation necessary to accomplish the following reforms and (2) guide agency implementation of the resulting programs:

- **Liability for U.S. Importers and Foreign Exporters/Producers.** Importers should be required to verify the safety of their suppliers' products. They should face strict penalties, civil and criminal, for submitting verifications that are inadequate or misleading. Rigorous civil enforcement, as well as criminal prosecutions of the corporate officers responsible for importing dangerous products, may be the only threats severe enough to spur the creation of a robust third-party inspection system to be supervised by importers in order to protect themselves from liability. The "supplier verification program" envisioned by the FSMA represents a positive step in this direction for food imports, though its effectiveness will depend on effective certification programs for prospective third party inspectors.
- **Expanded Authority.** The Import Working Group should develop and submit to Congress draft legislation that would establish agencies' enforcement jurisdiction over foreign companies and facilitate private causes of action against overseas firms for exporting unsafe products to the United States.

Second, the President should direct the Import Working Group to study additional options for reducing the dangers posed by imports, including but not limited to:

- **Extension of USDA-Style Comparability Standards and Inspection Regimes to Other Import-Related Agencies.** Under the standard governing the USDA's Food Safety and Inspection Service (FSIS), only countries with regulatory systems deemed "equivalent" to the U.S. system are permitted to export meat and poultry to the United States. This standard allows the agency to leverage the resources of other governments, which are incentivized to improve their own safety systems. The FSIS standard leaves

far too much room for unsafe imports due to the vagueness and flexibility of the term “equivalent,” but it is still leaps and bounds above the standards of the FDA and the CPSC, which do not require any pre-approval of foreign safety systems at all. In addition, the FSIS conducts robust inspections at foreign food facilities and at ports of entry, including on-site evaluations of a foreign government’s inspections of slaughtering facilities and testing laboratories, as well as collection of samples at U.S. ports for drug residue testing, microbial testing, and labeling verification. By contrast, the FDA’s inspection of drug residues in seafood is typically limited to reviewing *documentation* of compliance by a facility or importer.²⁵ The Import Working Group should study the feasibility of extending USDA-style comparability standards and inspection regimes to other agencies, including the FDA and the CPSC, asking them to estimate the additional funds and staff they would need for implementation and, if advisable, encouraging Congress to provide the necessary budgets and legal authority.

- **Review of Trade Agreements and the Obstacles They Pose to Import-Safety Reforms.** The Import Working Group should analyze how several World Trade Organization (WTO) agreements might constrain the development of more rigorous import safety measures in the United States. It should (1) advise Congress and the agencies on how to reform import safety without triggering legitimate complaints that the new U.S. regimes impose unwarranted restrictions on international trade; (2) develop legal arguments to aid the U.S. Trade Representative in resisting any collateral attacks on U.S. safety standards through mechanisms such as the General Agreement on Tariffs and Trade (GATT) or the Agreement on the Application of Sanitary and Phytosanitary Measures; and (3) make recommendations to the President about which WTO agreements or provisions should be renegotiated because they permit trade concerns to trump health and safety.
- **Better Coordination of Import Safety Functions.** The Import Working Group should consider clarifying how the agencies, despite their varying jurisdictions, can optimize their respective performances within their designated spheres and improve integration with their counterpart agencies.

Protecting the Health and Safety of Children and Future Generations

Safeguarding the Most Vulnerable Members of Our Society

Politicians of both political stripes are fond of invoking the need to “put kids first,” but when it comes to protecting children against unreasonable health and safety risks the United States continues to lose ground. Nowhere is the backsliding more evident than in ensuring that U.S. employers provide healthy and safe working conditions for child workers. For example, last April, the Department of Labor (DOL) fumbled its long overdue effort to update 40-year-old “hazardous orders” that bar children as young as 12 from doing dangerous work in agriculture. Responding to self-serving and inaccurate attacks on the rule by the American Farm Bureau Federation and other advocates for industrialized agriculture, the DOL cancelled the rulemaking before it even bothered to respond to the thousands of public comments it received.

Agriculture is among the most hazardous industries for younger workers, accounting for 10 percent of all fatal workplace injuries involving that group and the second highest fatal injury rate for any industrial sector.²⁶ Several recent tragedies illustrate this industry’s hazards for younger workers. In July of 2010, 14-year-old Wyatt Whitebread and 19-year-old Alejandro Pacas became engulfed in tons of collapsing grain in an Illinois grain silo, smothering them to death in seconds. In August of 2011, two 17-year-olds, Bryce Gannon and Tyler Zander, each lost a leg after losing control of a large sweep auger while trying to clear out a grain silo.²⁷

Conditions are especially dire for child migrant farmworkers. The 40-year-old safety standards permit these children to begin toiling in fields at the age of 12 for up to 10 hours a day, six days a week. Because of lax enforcement, underage workers—some as young as eight—are prevalent, and many work longer than the 10 hours per day permitted by law regardless of age. Even when child migrant farmworkers are able to avoid suffering fatal or permanently disfiguring injuries, they must still daily endure “[e]xtreme heat, repetitive strain and exposure to toxic substances such as pesticides”—hazards that greatly increase their chances of developing lifelong health problems.²⁸

For too long, the federal government has lacked a clear agenda for making progress on protecting children’s health and safety, and as a result the youngest members of our society continue to bear a unique and disproportionate share of the cumulative burdens of our industrialized economy.

An effective agenda must account for children’s unique vulnerabilities. Kids breathe faster, eat and drink more in comparison to their body weight, and spend more time outdoors. Their brains, lungs, hearts, and immune and endocrine systems—all still developing and very fragile—are more susceptible to the harms that environmental contamination can cause, including asthma, leukemia and other cancers (particularly because cancer often develops through mutations, and the rate of cell growth and division are especially high among children, making them more susceptible to mutation driven cancers), permanent brain damage, heart defects, and premature death. The cumulative burden is greatest for children living in poverty who tend to live in pollution “hot spots,” while inadequate access to healthcare and nutrition compromises their resiliency to environmental risks even further.

An effective agenda must also account for the environmental legacy we leave these children and future generations, starting with climate change. Recent research concludes that average global temperatures are most likely to rise about 8 degrees Fahrenheit by 2100—at the high end of most models’ projections—unless drastic actions are taken soon.²⁹ Such a scenario would irreversibly change the earth’s biosphere, threatening the viability of human civilization as we know it, potentially within the lifetime of our children or grandchildren.

Solution by Executive Order

President Obama should amend Executive Order 13045 so that it establishes a clear affirmative agenda, with deadlines, for agencies to carry out effective regulatory actions needed to address high priority threats to the health and safety of children and future generations. Issued in 1997 by President Bill Clinton, Executive Order 13045 established an interagency Task Force on Environmental Health Risks and Safety Risks to Children and charged it with coordinating research and developing broad strategies for achieving the Order’s goals. The Order’s biggest weakness is that it does not empower the Task Force to take any concrete actions, and as a result the Task Force’s actions to this point have not translated into meaningful safeguards.

The amended Order should establish an iterative process requiring the Task Force to develop and carry out a coordinated regulatory agenda every three years in which each member agency identifies specific regulatory actions it can undertake, either individually or in collaboration, to achieve four specific high priority children’s health and safety goals. The Order should establish a three-year cycle for undertaking each iteration of this agenda-setting and implementation process that includes the following three steps:

- By the end of the sixth month, the Task Force should develop and make public its planned regulatory agenda.
- By the end of the 18th month, the agency Task Force members should publish proposals for all planned regulatory actions contained in the agenda.
- By the end of the third year, the agency Task Force member should publish final rule for all planned regulatory actions contained in the agenda.

Each iteration of the Order’s regulatory agenda process should address four high priority children’s health and safety goals. The Order should establish two “standing” high priority children’s health and safety goals that will be addressed in each iteration of the Order’s regulatory agenda process: one to address Toxic Chemicals and one to address Climate Change, as described below. In addition, the Order should direct the Task Force to identify and address two additional “ad hoc” high priority children’s health and safety goals for each iteration of the Order’s regulatory agenda process. As described below, the Order should adopt (1) workplace health and safety and (2) asthma as the two ad hoc children’s health and safety goals to be addressed in the first iteration of the regulatory agenda process. In subsequent iterations of the regulatory agenda process, the Task Force could continue working on these issues as their ad hoc children’s health and safety goals, if additional progress is needed, or it could adopt new issues to address for its ad hoc children’s health and safety goals.

The Order should designate as its initial four high priority children's health and safety goals the following:

- Ad hoc children's health and safety goal: workplace health and safety. Each Task Force member should coordinate with the Department of Labor in developing new health and safety regulations for protecting children and young adults employed in the agriculture, construction, and service industries. Hazards that should receive careful attention should include excess heat, repetitive stress, pesticides, enclosed spaces, excess noise, heavy machinery, and workplace violence. Special emphasis should also be given to identifying effective enforcement strategies for ensuring compliance with the new regulations.
- Ad hoc children's health and safety goal: asthma. Under the direction of the EPA, the Task Force members should identify the environmental contaminants known or suspected to cause childhood asthma, and then identify what legal authorities each has for issuing new or updated regulations to reduce children's exposure to those contaminants. In particular, the Task Force should focus on initiatives to reduce ambient ozone and address the various exposure pathways that bring children into contact with known or suspected asthma-causing pesticides.
- Standing children's health and safety goal: toxic chemicals. In the first iteration, each Task Force member with legal authority to regulate (1) bisphenol-a (BPA), (2) lead, (3) mercury, (4) perchlorate, and (5) phthalates should identify gaps in their regulations for addressing children's exposure to these chemicals, including any existing rules that need to be strengthened, and develop new regulations for reducing such exposure. The Order should also specifically direct Task Force members to evaluate the safety of likely substitutes for these five chemicals to ensure that dangerous chemicals are not adopted as replacements. Subsequent iterations should follow a similar process for addressing five new toxic chemical threats.
- Standing children's health and safety goal: climate change. Each Task Force member should review and catalog its legal authorities for undertaking regulatory actions to address the goals of climate change mitigation and adaptation. On the basis of this review, the Task Force should identify between six and eight high priority regulatory initiatives its members can undertake that will substantially reduce the causes of climate change or improve U.S. capacity to adapt to climate change. Subsequent iterations should follow a similar process for undertaking six to eight new high priority climate change regulatory initiatives.

Protecting Contingent Workers

Enhancing Health and Safety Protections in Modern Employment Relationships

A new trend in the U.S. labor market is reshaping how management and workers think about employment, while at the same time beginning to reshape the field of occupational safety and health. More and more, workers are being employed through “contingent work” relationships. Day laborers hired on a street corner for construction or farming work, warehouse laborers hired through staffing agencies, and hotel housekeepers supplied by temp firms are common examples. Their shared experience is one of little job security, low wages, minimal opportunities for advancement, and, all too often, hazardous working conditions.

For the occupational safety and health community, these new forms of employment relationships unravel what were once clear ties between employees and employers. As the connections between workers and the management professionals who control working conditions become more tenuous and short-term, the longstanding occupational safety and health regime that relied on union contracts, workers’ compensation, and enforcement of the Occupational Safety and Health Act (OSH Act) to ensure safe working conditions is faltering. Industries with high percentages of contingent workers, like warehousing and farming, have stubbornly high rates of occupational injuries. And within the construction industry, the particular occupations in which contingent workers are most often used are some of the jobs with the highest injury and illness rates.

Musculoskeletal injuries are a major source of work-related injuries in jobs held by many contingent workers, such as farming, warehousing, construction, and hotel housekeeping. Lower backs, shoulders, and upper extremities get abused as workers engage in repetitive motions in awkward positions.

Contingent workers are often drawn from socially vulnerable populations. From 1995 to 2005, the share of contingent workers who were Latino jumped from 12.7 percent to 21.4 percent.³⁰ In certain industries, such as construction and farming, immigrants make up significant fractions of the contingent workforce. Wages are often suppressed, making the consequences of disabling work-related injuries that much more dire.

Reforms to federal laws, regulations, and policies could help ensure that contingent workers are better protected from workplace hazards. The President should draft an Executive Order that will encourage administrative agencies to use their existing powers to eliminate occupational hazards particular to contingent workers.

Solution by Executive Order

To provide for better occupational and safety protections for contingent workers, President Obama should issue a new Executive Order that contains the following elements:

Enforcement “Sweeps” in Targeted Industries Backed Up by Strong Penalties

The new Executive Order should direct the Occupational Safety and Health Administration (OSHA) to begin with a series of enforcement “sweeps” that target the temporary help industry. Specifically, the Order should direct OSHA to identify the workplaces where temporary staffing firms send temporary workers and use this information for targeted inspections of these workplaces.

The Executive Order should also instruct OSHA and the Solicitor of Labor to tailor their methodology for assessing penalties for regulatory violations to fit the unique circumstances of contingent workers. In general, the OSH Act directs OSHA to set a gravity-based penalty for regulatory violations and then reduce that penalty, as appropriate, by considering other factors, including the business’s size, the employer’s “good faith” in attempting to comply with applicable standards, and the employer’s history of cited violations.³¹ When determining a business’s size for penalty reduction purposes, the new Order should direct OSHA to explicitly assume that new workers fill positions on a regular basis and require that it count each new contingent worker toward the total size of the business, as opposed to its existing policy of calculating the business size from the number of workers at a particular point in time. In addition, the new Order should direct OSHA inspectors to require employers to demonstrate that their safety and health programs make special accommodations to contingent workers in order to qualify for the “good faith” penalty reduction.

Development of Industry-Specific Ergonomics Rules

The new Executive Order should direct OSHA to establish an affirmative regulatory agenda, with deadlines, for issuing a series of industry-specific ergonomics rules, geared toward particular hazards. OSHA published an ergonomics standard in early 2001, only to see it invalidated by Congress and President Bush through the Congressional Review Act (CRA) later that year. The CRA prohibits an agency from publishing a rule in substantially the same form as the one overturned by Congress, but the narrower focus of this proposal would make OSHA’s actions clearly legal. In particular, the new Order should direct OSHA to work with the National Institute for Occupational Safety and Health (NIOSH)—OSHA’s sister agency that focuses on cutting-edge occupational health and safety research—to develop evidence for new ergonomics standards to eliminate hazards in industries that utilize a substantial number of contingent workers. The Order should direct OSHA to propose ergonomics standards for agriculture, construction, warehousing, and any other industry with significant numbers of contingent workers suffering musculoskeletal injuries. The proposals should be published within 18 months after the Order is issued and final rules within 18 months after the proposals have been published.

Reform of Voluntary and Consultation Programs

The new Executive Order should direct OSHA to revise the minimum criteria that companies must meet to be part of OSHA’s Voluntary Protection Program (VPP) to account for those companies’ treatment of their contingent workers. OSHA created this program to reward employers who develop high-quality safety and health programs. In exchange for developing such a program, maintaining below-average injury and illness rates, and committing to

addressing health and safety concerns quickly, VPP employers get an assurance from OSHA that their worksites will not be subject to normal inspections (only inspections resulting from complaints, referrals, or incidents involving injuries or deaths).

Given the health and safety concerns raised by employer decisions to place contingent workers in new and high-hazard jobs, the new Executive Order should direct OSHA to require as a condition for entry into the VPP that VPP employers only use contingent workers in low-hazard occupations such as clerical work. Currently, the VPP addresses contingent worker health and safety by comparing injury rates between regular employees and temporary employees, supplemented by interviews with temporary and contract employees.³² Firms applying to the VPP are also supposed to encourage contractors to have health and safety programs. To better understand whether a firm applying for VPP recognition is off-loading health and safety concerns to others through inappropriate use of contingent workers, the new Order should require OSHA to update its analysis to include a review of the types of jobs performed by contingent workers and an accounting of the hours worked by contingent workers as opposed to regular employees in high-hazard jobs. The Order should direct OSHA to reject applicants if OSHA inspectors uncover evidence of disproportionate use of contingent workers in high-hazard jobs on the applicants' worksites.

Likewise, the new Executive Order should direct OSHA to reject applicants to its Safety and Health Achievement Recognition Program (SHARP) if they use disproportionately large numbers of contingent workers in high-hazard jobs. Similar to the VPP, SHARP offers smaller employers the benefit of no "programmed" inspections when these firms consent to a comprehensive on-site consultation visit from OSHA-approved professionals and have (1) low injury and illness rates, (2) good injury and illness prevention programs, and (3) fewer than 500 workers nationwide and fewer than 250 workers at the worksite for which SHARP recognition is sought.

Expanded Cooperation with Foreign Consulates

The new Executive Order should direct OSHA to increase engagement with foreign governments' consulates to protect and improve contingent workers' health and safety. A significant number of contingent workers in the United States are foreign-born, especially in certain high-hazard industry sectors, such as agriculture and construction. OSHA has a number of Letters of Agreement with consulates from Mexico, the Dominican Republic, Guatemala, El Salvador, Ecuador, and other Central and South American countries, signed by both the national and area offices. The Letters of Agreement mostly focus on developing training and outreach programs that are designed to teach workers about their rights under the OSH Act and related laws. But there have been some innovative ideas that should be expanded upon. For instance, OSHA and the Nicaraguan embassy and consulates agreed to develop a joint program that would enable the foreign officials to file OSHA complaints on behalf of Nicaraguan workers in the United States. Ideally, one aspect of that program would be to ensure that someone from the embassy or consulate would be invited to participate in the resulting inspection as a worker representative so that workers would have a translator. Agreements with area offices might also enable OSHA staff to have a point of contact that would help them find translators for other inspections. The demographics of the contingent workforce likely presage changing

demographics of the United States as a whole, so OSHA would do well to continue on the path of expanding its foreign-language capabilities so as to remain effective in the future.

Reforming OIRA's Role in the Regulatory System

Reinvigorating the Regulatory System by Rebuilding a Powerful Regulatory Institution

The White House Office of Information and Regulatory Affairs (OIRA) is one of the most powerful offices in the entire federal government and, at the same time, largely unknown. Starting in the Reagan Administration, a series of Executive Orders have authorized OIRA to review agencies' biggest rules under a cost-benefit test before they are made public, making it the *de facto* gatekeeper for the entire federal regulatory system. Under both Democratic and Republican administrations, OIRA has used this review to delay, weaken, and even block rules that might distress influential industries.

The problem is that, by and large, cost-benefit analysis does exactly what the Reagan-era industry lobbyists who initially pushed for it intended. Because many of the most important benefits of regulation—things like saving lives and preserving ecosystems—simply can't be calculated in dollar terms, it over-emphasizes the costs and under-estimates the benefits of regulation, thereby providing increased pressure to make regulations less stringent and more friendly to industry. When Congress passed our environmental health and safety laws in the 1970s, it understood the anti-regulatory bias inherent in cost-benefit analysis and accordingly directed the agencies to use other yardsticks to measure the quality of regulations: Do they adequately protect the public health? Do they require use of the best available technology? These statutory standards provide much more meaningful methodologies for setting regulatory limits—accounting for the rules' pros and cons, but without resorting to fruitless and controversial attempts to monetize incalculable values.

Because it produces such manipulable numbers, cost-benefit analysis has also made the rulemaking process more vulnerable to corporate pressure. Industry lobbyists can always hire another consultant to quibble with the methodology an agency used to put a price on preventing cancer or saving an endangered species. And OIRA has facilitated that process, welcoming a steady stream of corporate lobbyists who use the office as a court of last resort, meeting with OIRA officials behind closed doors to seek changes in rules undergoing review. A 2011 CPR study found that 65 percent of OIRA meeting participants represented corporate interests, compared to just 12 percent representing public interest groups.³³ And these lobbying efforts make a difference: More than two-thirds of OIRA reviews result in changes to agency rules³⁴—changes that empirical research shows nearly always operate to make rules less protective of public health and the environment and more palatable to industry.³⁵

Through the years, OIRA has expanded its influence over the regulatory system by asserting review authority over an ever-widening universe of agency actions. Executive Order 12866, which governs much of the regulatory review process, directs OIRA to focus its reviews, with rare exceptions, on only the biggest agency regulations—those with an annual impact of \$100 million or more. OIRA has broadly interpreted Executive Order 12866's exception, stretching it almost beyond recognition, to include almost any agency rule, no matter how minor. OIRA has also asserted review authority over various non-regulatory actions, including guidance documents and purely scientific determinations and assessments.

All of this is made worse by the fact that OIRA’s review process occurs largely behind closed doors. OIRA does not make public the minutes of its meetings or other communications with lobbyists. OIRA also does not consistently disclose all of the documents exchanged between it and the rulemaking agency during the review period, despite direction from Executive Order 12866 to do so. Among the documents that should be included in these disclosures are the pre- and post-review versions of agency rules, which the public could compare to identify the substance of the rule changes that OIRA has demanded. Executive Order 12866 also directs rulemaking agencies to summarize any substantive changes that are made during review and identify whether the changes came at the direction of OIRA, but these transparency requirements often go unheeded as well.

Even when OIRA’s interventions do not result in blocked or diluted rules, they often serve to delay critical rulemakings by months or even years.³⁶ Currently, one Environmental Protection Agency (EPA) rule—a proposal to establish a Chemicals of Concern list—has been stuck in OIRA review for more than two-and-a-half years, and an Occupational Safety and Health Administration (OSHA) proposal to limit workers’ exposure to silica has been under review for more than 21 months. To conceal these delays, OIRA has resorted to discouraging agencies from sending it draft rules, even when these drafts are ready for review. By taking this unusual step, OIRA can delay a rule without having to officially start the clock on the review period, which Executive Order 12866 caps at 90 days with a possible one-time extension of 30 days.

Compounding these delays, two more recent Executive Orders—13563 and 13610—require agencies to undertake an elaborate “look-back” process to evaluate whether their existing rules should be changed or eliminated—a time-consuming and resource-intensive exercise that prevents agencies from moving forward with critical new safeguards.³⁷ A third Executive Order—13609—directs agencies to engage in a potentially time-consuming process for promoting international regulatory “harmonization” with other countries, which—aside from using valuable agency resources—could lead to a regulatory “race to the bottom” in which the United States lowers its standards to conform with those of international allies who have embraced a weaker commitment toward protecting people and the environment.

Solution by Executive Order

President Obama should issue a new Executive Order that requires OIRA to begin reorienting its role in the regulatory system so that it is aimed toward working proactively with agencies to help them achieve their statutory missions of protecting public health, safety, and the environment. The Executive Order should address the following issues:

Cost-Benefit Analysis

The new Executive Order should eliminate the cost-benefit analysis requirement contained in Executive Orders 12866 and 13563. It should instead re-affirm the agencies’ primary role in crafting protective safeguards and their duty to do so in accordance with the standards set forth in governing statutes.

In the alternative, the new Executive Order should at least initiate a sober and honest evaluation of the effectiveness of cost-benefit analysis in improving agency regulations. It should direct OIRA to conduct its own “look-back” study that examines and assesses the use of cost-benefit analysis as a tool for evaluating regulations. This study should examine a comprehensive and representative sample of cost-benefit analyses of prior rules. With respect to each rule, it should include the following:

- An evaluation of the accuracy of the analysis’ estimates of costs and benefits. This evaluation should use current data not available at the time of the original analyses in order to check the accuracy of the original projections. It should also catalogue the full range of societal costs and benefits implicated by the rule at issue and analyze the extent to which the monetary estimates did or did not reflect the full scope of costs and benefits.
- A calculation of the costs expended by the agency and by OIRA in conducting the cost-benefit analysis.
- To the extent feasible, an evaluation of the extent to which the agency actually used the cost-benefit analysis to inform its decisionmaking.

Restoring OIRA’s Focus on Reviewing Only Major Rules

The new Executive Order should reiterate the provisions of Executive Order 12866 that direct OIRA to focus its reviews on only the biggest rules—those with an annual impact of \$100 million or more. For those very rare occasions when OIRA determines that it must review a rule that falls within Executive Order 12866’s narrow exceptions, the new Executive Order should require OIRA to (1) explain in writing why the exceptions apply and (2) promptly post this explanation publicly (both on OIRA’s website and in the rule’s electronic docket). Lastly, the new Executive Order should explicitly prohibit OIRA from reviewing any non-regulatory actions, including all guidance documents and purely scientific determinations and assessments.

A New Role for OIRA: Reducing Regulatory Delay

Instead of interfering in individual rules, OIRA should adopt a new role aimed at improving the overall functioning of the regulatory system so that agencies can carry out their missions in a more timely and effective manner. Accordingly, the new Executive Order should require OIRA to address the problem of regulatory delay. The Order should direct OIRA to monitor agency rulemaking activities and identify those that have been hampered by excessive delay. The Order should then direct OIRA to work with the agency to identify solutions that will expedite the rulemaking. Finally, the Order should require OIRA to submit an annual report to Congress and the President that (1) describes the activities that it has undertaken to expedite rulemakings, (2) identifies common sources of undue regulatory delay, including unnecessary and duplicative analytic and procedural obstacles in the rulemaking process, and (3) proposes any needed legislative or administrative reforms for eliminating these sources of undue regulatory delay.

As noted above, OIRA oversees agency implementation of several procedural requirements that add unnecessary delay to the rulemaking process. To address these OIRA-related sources of regulatory delay, the new Executive Order should:

- Require agencies to submit their draft proposals and draft final rules to OIRA as soon as they are ready for review;
- Require OIRA to complete all rule reviews within 90 days and immediately release agency rules—regardless of whether review has been completed—when the 90-day limit has been reached; and
- Revoke Executive Orders 13563 and 13610, which establish the new look-back process, and Executive Order 13609, which establishes the potentially destructive process for promoting international regulatory harmonization.

Transparency in OIRA's Regulatory Review Activities

The new Executive Order should direct OIRA to better fulfill its transparency responsibilities under Executive Order 12866 by taking the following steps:

- Ending the practice of “informal reviews”—or reviews that take place outside the scope of Executive Order 12866—to ensure that all of its activities are subject to formally defined transparency requirements.
- Establishing a searchable online repository for disclosing and storing all written communications exchanged between it and rulemaking agencies during the regulatory review process. If OIRA determines that it is necessary to withhold certain interagency communications, then it should articulate a clear policy that delineates which documents will be withheld and which will be included in the online repository.

The new Executive Order should also seek to improve public disclosure of rule changes that are made during centralized review. Presently, Executive Order 12866 directs agencies to (1) provide the public with a clear summary of all substantive changes and (2) indicate which changes were made at the suggestion of OIRA as opposed to by the rulemaking agency. Agencies are already stretched thin by inadequate resources and excessive rulemaking requirements, so the new Executive Order should shift these responsibilities to OIRA. In addition, the new Executive Order should direct OIRA to develop a system for classifying whether a review resulted in significant changes (*i.e.*, changes that affect the rule's scope, impact, or estimated costs and benefits) as opposed to minor ones (*i.e.*, stylistic changes or other minor revisions). This system will make it easier for the public to monitor OIRA's regulatory review activities to ensure that improper political considerations are not unduly influencing the substance of agency rules.

Restoring the Office of Advocacy's Focus on Small Businesses

Leveling the Playing Field for Small Businesses

Few have heard of the Small Business Administration's (SBA) Office of Advocacy,³⁸ but this tiny office has also quietly become influential in the federal regulatory system, much like the White House Office of Information and Regulatory Affairs (OIRA). The Regulatory Flexibility Act (Reg-Flex) and the Small Business Regulatory Enforcement Fairness Act (SBREFA), among other statutes, empower the Office of Advocacy to oversee agency compliance with a long series of analytical and procedural requirements, which are purportedly aimed at ensuring that agencies account for small business interests when designing their rules. Notably, other groups—such as organizations representing poor and heavily polluted communities—are similarly under-represented in the rulemaking process despite being profoundly affected by regulations, but do not have a taxpayer-funded advocate working on their behalf.

The requirements that the Office of Advocacy oversees slow down rulemakings and waste scarce energy resources. They also provide the Office of Advocacy with leverage for coaxing agencies into making changes to their rules.

Since its establishment in 1976, the Office of Advocacy has emphasized pushing for weaker regulatory requirements for all businesses, rather than focusing on rule changes that will reduce negative impacts on small firms alone. For example, in its comments on the Environmental Protection Agency's (EPA) proposed rule to limit power plants' hazardous air pollution, the Office of Advocacy criticized the agency for not considering as a regulatory alternative a rule that limits only mercury while imposing no controls on other toxic pollutants, such as arsenic, lead, and formaldehyde.³⁹ This alternative is not narrowly tailored to help small businesses but would instead weaken the rule's requirements for power plants of all sizes, especially the large firms that dominate the electric utility industry.

Several mutually reinforcing factors have contributed to the Office of Advocacy's transformation into a tax-payer financed antiregulatory force within the government:

- Unrealistic small business size standards. The definition of “small business” that the Office of Advocacy employs for determining whether a particular firm qualifies for its help is a far cry from the common understanding of that term's meaning. According to this definition, a firm can employ more than a thousand workers and still be considered a small business, depending on what industrial sector the business is in. For example, a petroleum refinery is a “small business” as long as it employs fewer than 1,500 workers, and chemical plants that employ fewer than 1,000 workers qualify as “small businesses.”
- Partnership with OIRA. In 2002, President George W. Bush issued Executive Order 13272, which directed the Office of Advocacy to work closely with OIRA when intervening in agency rulemakings. OIRA has a strong antiregulatory culture and history of weakening rules. Through its collaboration with OIRA, the Office of Advocacy has come to see its role as similar to that of OIRA's, leading it to abandon its focus on helping small businesses.

- Undue influence of large corporations. One of the Office of Advocacy’s tasks is to facilitate small business participation in the rulemaking process. For example, SBREFA requires the Consumer Financial Protection Bureau (CFPB), the EPA, and the Occupational Safety and Health Administration (OSHA) to convene a panel of small business “representatives” to review planned rules that will potentially affect small businesses and suggest changes to such rules before the rest of the public even has a chance to see them. In several cases, small business representatives on these panels have included lobbyists representing large corporate interests or individuals that were suggested by large corporate lobbyists
- Inadequate oversight. During the past several decades, neither Congress nor the president has carefully supervised the Office of Advocacy’s activities. Without such oversight, the Office of Advocacy has had greater leeway to stray from its legislatively defined mission. The Office of Advocacy is insulated from presidential oversight, because it is not directly accountable to a Cabinet head or other White House official. The president does have power of removal for the head of the Office of Advocacy and can direct the Office’s activities through executive orders, however.

Solution by Executive Order

President Obama needs to hold the Office of Advocacy more accountable for its activities to ensure its focus is properly limited to helping small businesses. To do so, he should issue a new Executive Order that does the following:

- Establishing truly small businesses as the Office of Advocacy’s top priority. The small business size standards that the Office of Advocacy uses to guide its activities are set by law, so the president cannot alter them through an Executive Order. The president can, however, direct the Office of Advocacy on how to prioritize its implementation activities. Accordingly, the president should direct the Office of Advocacy to focus its interventions on helping truly small businesses—those with 20 employees or fewer. The Office of Advocacy should identify those rules that are likely have a big impact on a large number of businesses with 20 employees or fewer, and devote its efforts to working with rulemaking agencies to revise these rules to reduce their impact on such businesses. These steps will enable the Office of Advocacy to help genuinely small businesses remain economically competitive without significantly undermining critical environmental, health, and safety protections.
- Improving outreach to truly small businesses. The Office of Advocacy should restrict its outreach efforts to businesses with 20 or fewer employees. These businesses will have the best insight on which rules will have the biggest impact on them and on ways to reduce those impacts. In addition, these businesses are less likely to have the resources or expertise to participate effectively in the rulemaking process without the Office of Advocacy’s assistance.

To ensure the success of the provisions in this new Executive Order, President Obama should revoke Executive Order 13272. Because OIRA has such a strong antiregulatory culture, any continued collaboration with OIRA will likely only encourage the Office of Advocacy to

continue working to block or weaken regulatory requirements for all businesses rather than advocating specifically for the interests of truly small businesses.

Endnotes

¹ See, e.g., Michael Bloomberg, *A Vote for a President to Lead on Climate Change*, BLOOMBERG VIEW, Nov. 1, 2012, available at <http://www.bloomberg.com/news/2012-11-01/a-vote-for-a-president-to-lead-on-climate-change.html> (New York City Mayor Bloomberg endorsing President Obama in the wake of Hurricane Sandy, emphasizing the need for strong presidential leadership on climate change). See also Robert L. Glicksman, *Global Climate Change and the Risks to Coastal Areas from Hurricanes and Rising Sea Levels: The Costs of Doing Nothing*, 52 LOYOLA L. REV. 1127 (2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=944866.

² *Massachusetts v. EPA*, 549 U.S. 497 (2007).

³ In fact, back in March 2012, EPA Administrator Lisa Jackson stated EPA had “no plans to address existing plants” at that time. Andrew Restuccia, *EPA chief Jackson: ‘No Plans’ to Issue Climate Rules for Existing Power Plants*, THE HILL E² WIRE, Mar. 27, 2012, <http://thehill.com/blogs/e2-wire/e2-wire/218433-epa-chief-jackson-no-plans-to-issue-climate-rules-for-existing-power-plants> (last visited Nov. 29, 2012).

⁴ U.S. ENVTL. PROTECTION AGENCY, INVENTORY OF U.S. GREENHOUSE GAS EMISSIONS AND SINKS: 1990 – 2010, at 3-8 (2012), available at <http://epa.gov/climatechange/Downloads/ghgemissions/US-GHG-Inventory-2012-Main-Text.pdf>.

⁵ U.S. Env'tl. Protection Agency, Greenhouse Gas Reporting Program, GHG 2010: Reported Data, <http://www.epa.gov/ghgreporting/ghgdata/reported/index.html> (last visited Nov. 29, 2012).

⁶ Elizabeth McGowan, *EPA Puts Greenhouse Gas Rules for Oil Refineries on Backburner*, INSIDECLIMATE NEWS, Mar. 8, 2012, available at <http://insideclimatenews.org/news/20120308/epa-greenhouse-gas-emissions-rules-oil-refineries-power-plants-tailoring-rule-2012-elections-obama-climate-change>.

⁷ See U.S. GLOBAL CHANGE RESEARCH PROGRAM, GLOBAL CLIMATE CHANGE IMPACTS IN THE UNITED STATES (2009), available at <http://downloads.globalchange.gov/usimpacts/pdfs/climate-impacts-report.pdf>.

⁸ See, e.g., Exec. Order No. 13514 § 16 (“in support of the national adaptation strategy”); WHITE HOUSE COUNCIL ON ENVTL. QUALITY, PROGRESS REPORT OF THE INTERAGENCY CLIMATE CHANGE ADAPTATION TASK FORCE: RECOMMENDED ACTIONS IN SUPPORT OF A NATIONAL CLIMATE CHANGE ADAPTATION STRATEGY app.F (2010), available at <http://www.whitehouse.gov/sites/default/files/microsites/ceq/Interagency-Climate-Change-Adaptation-Progress-Report.pdf> (“Developing an overarching national strategy” as a priority for near-term action). Accord JOEL B. SMITH ET AL., PEW CENTER ON GLOBAL CLIMATE CHANGE, ADAPTING TO CLIMATE CHANGE: A CALL FOR FEDERAL LEADERSHIP 22-23 (2010), available at <http://www.c2es.org/docUploads/adaptation-federal-leadership.pdf>; NAT’L ACADEMY OF SCIENCES, ADAPTING TO THE IMPACTS OF CLIMATE CHANGE: REPORT IN BRIEF 4 (2010), available at http://dels.nas.edu/resources/static-assets/materials-based-on-reports/reports-in-brief/Adapting_Report_Brief_final.pdf; GOV’T ACCOUNTABILITY OFFICE, CLIMATE CHANGE ADAPTATION: FEDERAL EFFORTS TO PROVIDE INFORMATION COULD HELP GOVERNMENT DECISION MAKING 7-8 (2011), available at <http://www.gao.gov/assets/590/586293.pdf>.

⁹ See Alejandro E. Camacho, *A Learning Collaboratory: Improving Federal Climate Change Adaptation Planning*, 2011 BYU L. REV. 1821, 1839-44 (2011), available at http://www.lawreview.byu.edu/articles/1325788726_02Camacho.FIN.pdf.

¹⁰ See Daniel A. Farber, *Adaptation Planning and Climate Impact Assessments: Learning From NEPA’s Flaws*, 39 ELR 10605, 10605, 10609-10, 10613 (2009), available at http://ccrm.berkeley.edu/resin/pdfs_and_other_docs/Farber_climateimpactassess-learningfromnepaflaws.pdf.

¹¹ See J.B. Ruhl, *Climate Change and the Endangered Species Act: Building Bridges to the No-Analog Future*, 88 B.U. L. REV. 1, 31-53 (2008), available at <http://www.bu.edu/law/central/jd/organizations/journals/bulr/documents/RUHL.pdf>.

¹² See Jason S. McLachlan et al., *A Framework for Debate of Assisted Migration in an Era of Climate Change*, 21 CONSERVATION BIOLOGY 297, 299 (2007) (discussing an attempt to balance the risks and benefits of assisted migration through an approach called “constrained assisted migration”), available at <http://onlinelibrary.wiley.com/doi/10.1111/j.1523-1739.2007.00676.x/pdf>; Robert L. Glicksman, *Governance of Public Lands, Public Agencies, and Natural Resources*, in THE LAW OF ADAPTATION TO CLIMATE CHANGE: U.S. AND INTERNATIONAL ASPECTS 441, 467-68 (Amer. Bar Ass’n, Michael B. Gerrard & Katrina F. Kuh eds., 2012), available at <http://ssrn.com/abstract=2162603> (discussing the practical and legal difficulties facing assisted migration efforts).

¹³ See Lesley C. Jantarasami et al., *Institutional Barriers to Climate Change Adaptation in U.S. National Parks and Forests*, 15 ECOLOGY & SOC’Y 33 (2010), available at <http://www.ecologyandsociety.org/vol15/iss4/art33>; Glicksman, *supra* note 12, at 465-66.

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- ¹⁴ Ruhl, *supra* note 11, at 61-62.
- ¹⁵ See Camacho, *supra* note 9, at 1826-31.
- ¹⁶ See U.S. FISH & WILDLIFE SERV., RISING TO THE URGENT CHALLENGE: STRATEGIC PLAN FOR RESPONDING TO ACCELERATING CLIMATE CHANGE 15-16 (2010), available at <http://www.fws.gov/home/climatechange/pdf/CCStrategicPlan.pdf>.
- ¹⁷ U.S. FOOD & DRUG ADMIN., PATHWAY TO GLOBAL PRODUCT SAFETY AND QUALITY 15 (2011), available at <http://www.fda.gov/downloads/AboutFDA/CentersOffices/OfficeofGlobalRegulatoryOperationsandPolicy/GlobalProductPathway/UCM262528.pdf>.
- ¹⁸ See U.S. DEP'T OF COMMERCE, INDUSTRY REPORT: DOLLS, TOYS, GAMES, AND CHILDREN'S VEHICLES NAICS CODE 33993, at 1 tbl. (2012), available at <http://ita.doc.gov/td/ocg/2012%20toy%20report.pdf>.
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³⁸ The Office of Advocacy is housed within, but institutionally independent from, the SBA, a federal agency that supports America’s small business sector through subsidized loans, preferential government contracting, and other assistance programs. To illustrate the Office of Advocacy’s independence, the SBA’s organizational chart presents the Office of Advocacy as a “floating box” without any lines denoting a chain of command to the rest of the agency. See U.S. SMALL BUS. ADMIN., ORGANIZATION CHART, available at <http://www.sba.gov/sites/default/files/SBA%20Organization%20Chart%2003-16-2012.pdf>.

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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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