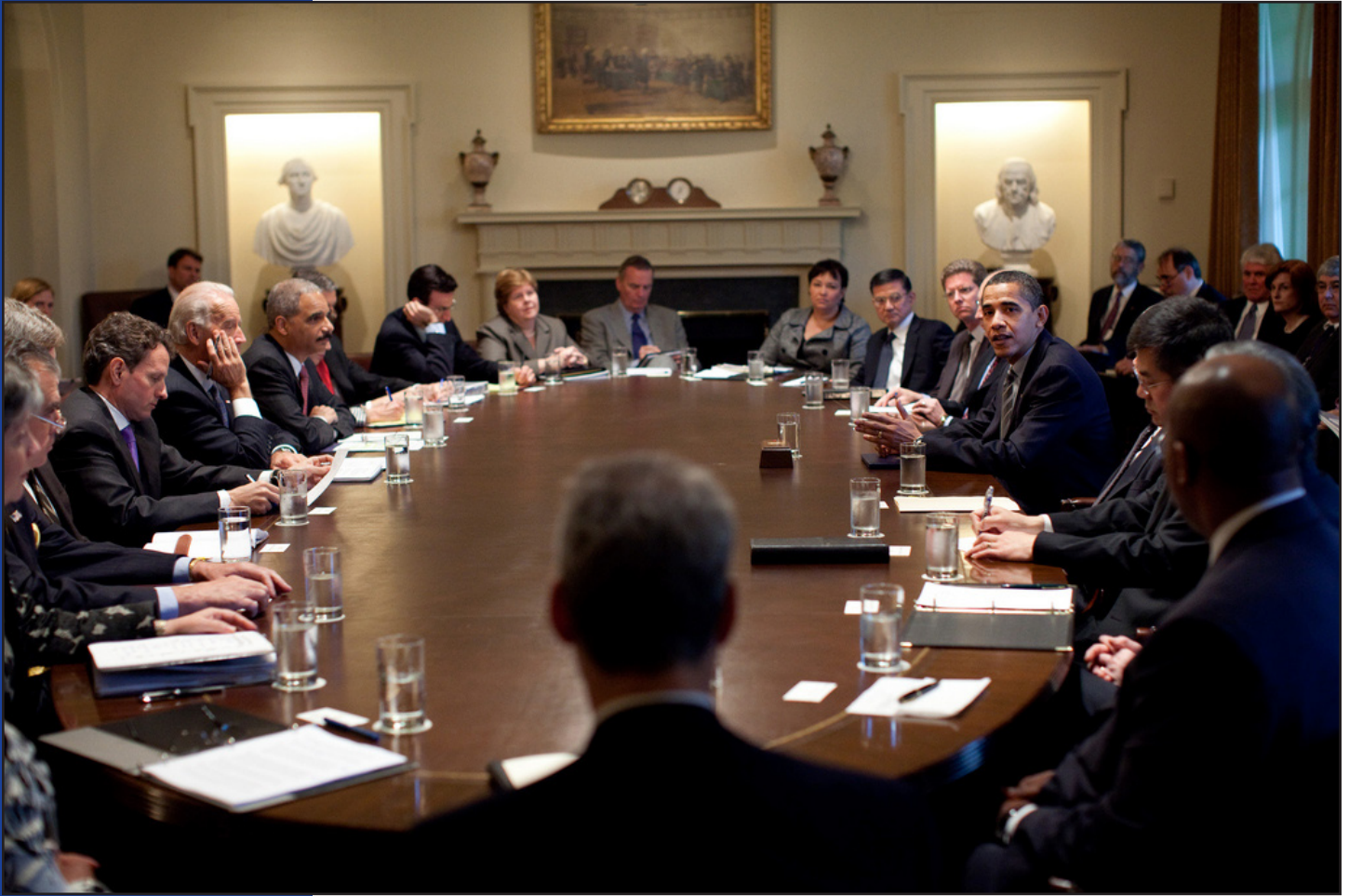


# Obama's Regulators:

A First-Year Report Card



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**CPR**   
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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. The Center for Progressive Reform is grateful to the Deer Creek Foundation, the Bauman Foundation, the Public Welfare Foundation, and the Open Society Institute for their generous support of its work in general.

This report is a collaborative effort of the following Member Scholars and staff of the Center for Progressive Reform: **Amy Sinden**, Temple University Beasley School of Law; **Rena Steinzor**, University of Maryland School of Law; **Shana Jones**, CPR Executive Director; and **James Goodwin**, CPR Policy Analyst.

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## Executive Summary

When campaigning for President, Barack Obama articulated a strong and proactive vision of government.

Now, understand, I don't believe that government can or should try to solve all our problems. You don't believe that either. But I do believe that government should do that which we cannot do for ourselves: protect us from harm; provide a decent education for all children; invest in new roads and new bridges, in new science and technology.

These ideas were an inspiring change for everyone concerned about health, safety, and environmental protection, and contributed significantly to the enthusiasm about his candidacy in progressive circles.

One year into the Obama Administration, it is fair to assess the Administration's progress by the pledges the President made as a candidate. This report grades the Administration's progress in achieving promised change by looking at the six most critical agencies and offices responsible for accomplishing the President's promises in these areas:

1. Consumer Product Safety Commission (CPSC)
2. Environmental Protection Agency (EPA)
3. Food and Drug Administration (FDA)
4. National Highway Traffic Safety Administration (NHTSA)
5. Occupational Safety and Health Administration (OSHA)
6. White House Office of Information and Regulatory Affairs (OIRA)

**Overall, we found that the Obama Administration has not yet lived up to its own vision of protective and proactive government and would give its efforts to date an overall grade of B-.**

In comparison to the administration of George W. Bush, President Obama has brought extraordinarily positive change to Washington and this progress is even more impressive when viewed against the backdrop of a severe recession, two wars, and a contentious debate over health care. But judged from the more objective perspective of the reforms needed to breathe new life into the federal government's vital work to protect Americans from health, safety, and environmental hazards after years of inattention and decay—the standard the President set for himself—the Obama Administration has made a start, but only a start. It has a very long way to go, and even one year into his Administration, there is reason to worry that the Administration lacks an appropriate sense of urgency about the regulatory challenges it confronts.

### Summary of Results

On the positive side, we found that the President and the five “protector agencies” covered in this report—the CPSC, the EPA, the FDA, the NHTSA, and the OSHA—took many steps in the right direction during the past year:

## Grading Criteria

We used the following criteria to evaluate the protector agencies and the White House:

We judged how well each protector agency effectuated a protective regulatory agenda by considering:

- ✓ Enforcement and inspection efforts (if applicable);
- ✓ Protective actions they have taken or that should have been taken over the past year; and
- ✓ Leadership and resources.

For the White House, we asked how well it established a proactive and protective regulatory landscape. We considered its:

- ✓ Management of the Office of Information and Regulatory Affairs (OIRA);
- ✓ Budget requests for the protector agencies;
- ✓ Stimulus bill investments;
- ✓ Promotion of transparency; and
- ✓ Promotion of scientific integrity.

While this report seeks to provide a comprehensive evaluation of the Obama Administration's regulatory performance, it does not attempt to account for every regulatory action that the Administration has taken. Instead, this report seeks to focus on the most pressing regulatory issues that need immediate attention if President Obama is going to make a significant and lasting impact on health, safety, and the environment.

The evaluative yardstick used for the assessments that follow for the Obama Administration's regulatory performance is the aggressive standard it had set for itself during the presidential campaign and transition period. The report consciously resists measuring the Obama Administration's regulatory performance against that of its predecessor. Because the Bush Administration set the bar so low on health, safety, and environmental issues, mere incremental improvement on its regulatory performance is not an indication that an agency is back on the right track. Indeed, one of the key lessons of the evaluation is that in some cases, the Administration seems not quite able to grasp the scope and urgency of the challenges it confronts.

We also took into account three important contextual issues to more accurately evaluate the Obama Administration's performance in the policy areas of public health and worker safety.

First, President Obama inherited a highly dysfunctional regulatory system. The resources for accomplishing the President's vision—the protector agencies themselves—are a mess. For years, their budget and personnel have been slashed. Political appointees have been openly hostile to their missions.

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- Most of the protector agencies have significantly improved their inspection and enforcement efforts.
- The protector agencies began to address important health, safety, and environmental issues that have been ignored for too long, including climate change, cleaning up the Chesapeake Bay, and imported food and product safety.
- The protector agencies improved warnings for workplace hazards and for consumer products, food, and drug safety.
- The protector agencies began strengthening standards in areas like smog, sulfur dioxide, lead, over-the-counter drugs, and automobile rollover crash safety.
- The White House has taken important steps toward promoting transparency and scientific integrity, although much remains to be done, especially with respect to its own practices in conducting regulatory review.

On the negative side, the five agencies still lag far behind where they need to be in reviving their long-dormant efforts to provide meaningful protection for children, workers, consumers, the elderly, the ill, and communities of color:

- The protector agencies responded too slowly to several threats, including toxic Chinese drywall, perchlorate, atrazine, bisphenol A (BPA), combustible dust, beryllium, and construction equipment safety.
- The protector agencies made no discernible progress in addressing a number of long-ignored threats, such as large concentrated animal feeding operations (CAFOs) and hazardous workplace chemicals.

## Grading Criteria

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Stiff opposition from the industries under their authority only compounded the political interference by ideological opponents of regulation. Outdated statutes provided the agencies inadequate legal authority to tackle new and emerging health and safety threats. In short, President Obama inherited a hobbled, starved, and demoralized bureaucracy. He faces an uphill battle in translating his positive vision of government into reality. Even if the Obama Administration undertook genuine efforts to reinvigorate the protector agencies, these efforts would not bear fruit immediately. Instead, the protector agencies would likely continue to underperform for some time.

Second, many key leadership positions remained unfilled during the first year of the Obama Administration. Because the appointment process for these leadership positions is exceedingly complex, this report does not seek to assign blame for the vacancies. Our evaluations do take account of these vacancies, however, because a lack of leadership can inhibit an agency's ability to carry out its regulatory mission.

Third, the outgoing Bush Administration saddled the Obama Administration with a number of "midnight regulations" written to defeat the health, safety, or environmental aims of the authorizing statutes. EPA in particular has several troublesome midnight regulations that it must reverse. Adopted in the waning days of the Bush Administration, many of these regulations solidified Bush's legacy of feeble regulatory protections. The Obama Administration thus has the dual task of eliminating or replacing these midnight regulations—a time- and resource-intensive undertaking—while simultaneously launching an affirmative agenda of protecting public health and worker safety.

This report also recognizes that the wheels of regulation can turn slowly, making it difficult for an energetic administration to launch an affirmative regulatory agenda even under the best of circumstances. It is especially important to take this into account, since the Obama Administration has at least three more years to translate its positive vision of government into reality. Nevertheless, if the wheels of regulation turn too slowly, as they often do, it is the responsibility of the Administration to speed them up. After all, experience shows that four years can pass in the blink of an eye: If an Administration does not pursue its regulatory agenda aggressively enough, then too many important tasks remain undone.

- The protector agencies made significant mistakes implementing some programs, notably the CPSC's chemical testing for toys and the EPA's main toxicological database (the integrated risk information system or IRIS).
- Through OIRA, the White House has continued many of the most harmful practices of the Bush era, obstructing the protector agencies' progress on protecting people and the environment through its scientific interference and review of individual regulations.

This report measures the Obama Administration's performance against the standards that the President articulated as a candidate, rather than against the standards set by the previous administration. Given that the Bush Administration had set the bar so low on health, safety, and environmental issues, its regulatory performance simply did not provide a meaningful basis for comparison. That said, our evaluations take into account the difficult circumstances under which the Administration had to operate—namely, inheriting a largely dysfunctional regulatory system, operating with many key leadership posts vacant for much of the year, and facing the challenge of overturning Bush-era midnight regulations while launching its own affirmative regulatory agenda.

Judged by those evaluative criteria, the protector agencies and the White House earned the following grades:

ASSESSMENT	GRADE	TREND	see page
<p><b>CONSUMER PRODUCT SAFETY COMMISSION (CPSC)</b> <a href="#">(click here for details)</a></p> <p>Despite facing many challenges, CPSC appears committed to improving its enforcement record, and has taken important new steps to protect consumers from dangerous products. The agency did not respond well to the toxic drywall crisis and toy testing.</p>	C	↑	6
<p><b>ENVIRONMENTAL PROTECTION AGENCY (EPA)</b> <a href="#">(click here for details)</a></p> <p>With leadership committed to the agency’s regulatory mission and increased resources, EPA tackled several important environmental issues this past year, including making progress on climate change regulations, ground level ozone, sulfur dioxide, lead air pollution monitoring, and Chesapeake Bay cleanup. EPA failed, however, to take regulatory action against perchlorate, atrazine, and mercury air pollution, and it has done nothing to improve its overall inspection and enforcement record.</p>	B	↑	9
<p><b>FOOD AND DRUG ADMINISTRATION (FDA)</b> <a href="#">(click here for details)</a></p> <p>With leadership committed to the agency’s regulatory mission and increased resources, FDA significantly improved its overall inspection and enforcement record, and began addressing long-ignored food- and drug-safety issues. FDA has been too slow to address the threat to children’s health posed by bisphenol A (BPA), and much more must be done to protect the U.S. food supply.</p>	B	↑	17
<p><b>NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION (NHTSA)</b> <a href="#">(click here for details)</a></p> <p>Despite many challenges, NHTSA made some progress on improving overall traffic safety and automobile fuel efficiency. Significantly though, much of this progress involved finalizing some pending rules from the Bush Administration, rather than from any new protective initiatives launched by the agency this past year. Also, NHTSA’s proposed corporate average fuel efficiency (CAFE) standards were not strong enough.</p>	B-	↑	21
<p><b>OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION (OSHA)</b> <a href="#">(click here for details)</a></p> <p>Thanks to an improved budget, OSHA strengthened its inspection and enforcement record. The agency made important progress on developing a hazard communication (HazCom) rule and a diacetyl standard, but yet has to take action on literally hundreds of well-known workplace hazards.</p>	C	↑	24
<p><b>THE WHITE HOUSE</b> <a href="#">(click here for details)</a></p> <p>Overall, the White House’s participation in the regulatory process has undermined the agencies’ recovery, with the Office of Information and Regulatory Affairs (OIRA) largely operating as a barrier to effective regulations. Although President Obama’s budget requests were an improvement over the Bush Administration, the budget requests, most notably for CPSC and NHTSA, were not large enough to reverse agencies’ chronic underfunded state.</p>	C-	↔	28

An analysis of the efforts of each of these agencies and the White House revealed the following trends on critical cross-cutting areas

<p><b>MIDNIGHT REGULATIONS</b> <a href="#">(click here for details)</a></p> <p>The Obama Administration’s progress on reversing “midnight regulations”—the regulations finalized in the closing days and hours of the Bush Administration—was mixed. It reversed midnight regulations on perchlorate and CAFOs, but it did not reverse midnight regulations on lead air pollution monitoring and the “solid waste” definition for the Resource Conservation and Recovery Act (RCRA).</p>	C	↔	34
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ASSESSMENT	GRADE	TREND	see page
<p><b>TOXICS</b> (<a href="#">click here for details</a>)</p> <p>The Obama Administration has a mediocre record addressing specific toxics and other harmful substances. In many cases, unnecessary delays have plagued the protector agencies' response to many toxic chemicals. On the plus side, these agencies have begun reforming important programs intended to study emerging toxic threats, which should help expedite future control efforts.</p>	C		34
<p><b>CHILDREN'S HEALTH AND SAFETY</b> (<a href="#">click here for details</a>)</p> <p>The Obama Administration has taken several steps to deal with hazards that uniquely affect children. In some cases though, the protector agencies efforts to safeguard children's health and safety have been plagued by implementation problems, unnecessary delay, and interference from the White House.</p>	C		35
<p><b>WATER</b> (<a href="#">click here for details</a>)</p> <p>The Obama Administration made some progress cleaning up the nation's waters this past year, especially in the areas of cleaning up the Chesapeake Bay and curtailing mountaintop removal mining. Overall, however, its performance in this area needs substantial improvement, especially on such issues as toxic water pollutants and nonpoint source pollution.</p>	C		35
<p><b>AIR</b> (<a href="#">click here for details</a>)</p> <p>The Obama Administration has made progress on addressing many conventional air pollutants, such as ground level ozone and sulfur dioxide. EPA needs to improve its progress on toxic air pollutants and its enforcement programs.</p>	B		36
<p><b>CLIMATE CHANGE</b> (<a href="#">click here for details</a>)</p> <p>Climate change is the area where the Obama Administration has made the most progress. Highlights include proposed regulations for controlling greenhouse gas (GHG) emissions from stationary sources and the Administration's involvement in the Copenhagen negotiations. The proposed rules to control GHG emissions from automobiles were not as strong as they needed to be.</p>	A		36
<p><b>TRANSPARENCY</b> (<a href="#">click here for details</a>)</p> <p>The Obama Administration took important steps to promote transparency in the regulatory system, especially with regard to implementation of the Freedom of Information Act. The Administration's new transparency policy, the Open Government Initiative, contained several disappointing provisions, however.</p>	B		37
<p><b>SCIENTIFIC INTEGRITY</b> (<a href="#">click here for details</a>)</p> <p>The Obama Administration took steps to promote the principles of scientific integrity by launching its Scientific Integrity Initiative, but it has not yet completed this undertaking. Unfortunately, the White House did not always uphold these principles in practice.</p>	C		38
<p><b>BUDGET REQUESTS</b> (<a href="#">Click here for details</a>)</p> <p>On the whole, the Obama Administration took important steps in requesting badly needed increased resources for the protector agencies, although more resources are needed to enable the agencies to fulfill the full scope of their statutory mandates. The Administration requested budget increases for all of the agencies, but its budget increases for CPSC and NHTSA were too small to revitalize these agencies.</p>	B		38

## Report Card

### Consumer Product Safety Commission (CPSC)

No protector agency is more resource-starved than the Consumer Product Safety Commission (CPSC), one of the smallest protector agencies by far. For Fiscal Year 2007, the agency had only a \$63 million budget and a staff of 400 “full-time equivalents” (FTEs)—a far cry from the 1970s, when it employed nearly 900 FTEs and had a budget of more than \$145 million in today’s dollars. Yet the agency is nevertheless expected to protect more than 300 million consumers from thousands of products. By the agency’s own estimate, it has jurisdiction over some 15,000 product categories including everything from backyard barbecues and electric drills to swimming pool slides and baby dolls.

CPSC had little authority to force manufacturers to make their products safer until last year, when Congress increased the agency’s authority somewhat by adopting the Consumer Product Safety Improvement Act after a spate of high-profile product recalls. Even so, its regulatory authority remains limited. Most notably, the agency still lacks adequate regulatory authority for addressing unsafe imported products. For example, 80 percent of the toys sold in the United States are manufactured in China. Yet, as recently as 2007, the agency had only 15 inspectors to police the hundreds of billions of dollars worth of imports every year. CPSC has also suffered from a lack of leadership, making it difficult for the agency to accomplish much during a very challenging time in its history. Over the past year, the Obama Administration has taken the opportunity to turn this highly dysfunctional agency around, as CPSC tackled the following issues: enforcement, toy safety, product warnings, imports, toxic drywall, and product recalls.

In this section, we evaluate CPSC’s performance in promoting consumer health and safety over the past year. This evaluation considers CPSC’s enforcement efforts, as well as the protective actions it has taken or should have taken. To provide our evaluation with some context, we begin by looking at the agency’s leadership as well as the resources that have been made available to the agency.

**Leadership.** CPSC has suffered from a lack of leadership dedicated to its regulatory mission in recent years. By statute, CPSC is supposed to have five commissioners and needs a quorum of at least three to undertake any meaningful regulatory action, such as create new safety standards or issue mandatory recalls. However, during the last two years of the Bush Administration, three of the commissioner seats were vacant. Nancy Nord—a former industry lobbyist with decidedly pro-business views on regulation, and a notorious opponent of additional funding for the agency after millions of toys were recalled for lead paint—held one of the two seats.<sup>1</sup> During this period, Congress let the CPSC temporarily operate with two commissioners, but only on a limited budget.

President Obama quickly filled the vacant seats on the commission.<sup>2</sup> It is unclear if the new commissioners will be supportive of the CPSC’s regulatory mission, although at first blush all appear to be better in this regard than Nancy Nord.

- **CHAIRPERSON.** **Inez Tenenbaum** is the former State Superintendent of Education for South Carolina. She comes to the job with an excellent reputation, particularly on child welfare issues.

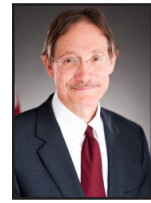


TENENBAUM



## Consumer Product Safety Commission (CPSC)

- **COMMISSIONER.** **Bob Adler** served as the consumer product safety advisor on President Obama’s transition team. He also has spent nine years as an attorney-advisor to two CPSC commissioners.
- **COMMISSIONER.** **Anne Northup**, a Republican, is a former member of the U.S. House of Representatives. In contrast to Tenenbaum and Adler, her background suggests that she can be relied upon to side with business interests, instead of consumers.



ADLER



NORTHUP

**Resources.** President Obama’s budget request for CPSC for Fiscal Year 2010 was too small to help out this historically under-resourced agency. **The Administration requested just \$107 million—an increase of less than 2 percent over the agency’s budget of \$105 million for Fiscal Year 2009.** Worse, President Obama’s budget request was about 10 percent short of the amount authorized by Congress; the Consumer Product Safety Improvement Act provided that CPSC could receive up to \$118 million in FY 2010.<sup>3</sup> CPSC is already one of the most resource-starved agencies, and it faces enormous challenges. The tiny \$2-million increase represents incremental improvement, but not the sea change that the agency needs to accomplish its work.

**Enforcement.** During President Obama’s first year in office, CPSC has made impressive statements about improving its enforcement record. It is still too early to tell whether these statements will be translated into meaningful action, however:

- Chairperson Tenenbaum has promised more and tougher enforcement actions, including making full use of the expanded enforcement tools that CPSC received through the Consumer Product Safety Improvement Act.<sup>4</sup>

**ASSESSMENT:** CPSC receives an incomplete on enforcement actions for President Obama’s first year in office. Time will tell whether the agency’s promises of stronger enforcement actions consistent with its expanded statutory authority will be fulfilled in reality.

**Protective Actions.** During the past year, CPSC took impressive protective action in the area of toxic toys, providing timely warnings to consumers about potentially dangerous products, and also in the area of imported products. CPSC must improve its performance in other areas, however, including the implementation of some aspects of its program for protecting children from toxic toys, its response to the toxic drywall crisis, and the effectiveness of its product recalls.

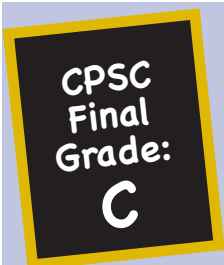
Steps Forward	Reasons for Concern
<p><b>Requiring labels for toys.</b> The labels required by the agency must include the name of the company as well as city and country where the product was made.<sup>5</sup></p>	<p><b>Unsuccessfully implementing the third-party testing requirements for lead and phthalates in children’s products.</b> CPSC has been excruciatingly slow to explain how it plans to implement the new law, forcing the agency to delay the testing and certification requirements for lead and phthalates until February of 2011—two years after the requirements were supposed to go into effect.<sup>6</sup></p>

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## Consumer Product Safety Commission (CPSC)

Steps Forward	Reasons for Concern <span style="float: right;">(continued from previous page)</span>
<p><b>Developing an improved web-based database to warn consumers about potentially dangerous products.</b> It would also allow consumers to file reports about products.<sup>7</sup></p>	<p><b>Failing to use its authority to exempt products that are obviously lead- and phthalate-free from the third-party testing requirements, which would speed and smooth program implementation.</b><sup>8</sup> The new Consumer Product Safety Improvement Act gives it this authority.</p>
<p><b>Opening its first overseas office in China to address the problem of dangerous imported products from that country.</b> Office staff will help educate Chinese officials about U.S. product standards.<sup>9</sup></p>	<p><b>Failing to conduct a timely investigation into the toxic drywall crisis.</b> Despite studying the issue for months, the agency is still unable to determine whether and how Chinese drywall has caused the health problems, foul smells, and corrosion that is being reported by thousands of homeowners.<sup>10</sup> As a stopgap, the agency recommended that people living in affected homes spend as much time outside in fresh air as possible.<sup>11</sup></p>
<p><b>Meeting with China.</b> Chairperson Tenenbaum has visited China twice since her appointment. She has met with the five largest toy manufacturers and with product safety officials in the Chinese government.<sup>12</sup></p>	<p><b>Failing to cooperate with state officials in conducting toxic drywall investigations.</b> According to Florida officials, CPSC investigators refused to share their findings and research, did not participate in weekly planning calls, and in many cases did not even notify state officials before conducting inspections and tests in Florida homes.<sup>13</sup></p>
	<p><b>Failing to track compliance with recalls of hazardous consumer products.</b> By law CPSC is required to keep monthly progress reports on product recalls it is undertaking. A study reviewing 25 such reports found that many had incomplete or inconsistent information, making it difficult to determine how successful the companies were at recalling their products.<sup>14</sup></p>

**ASSESSMENT:** Despite being underfunded again this year, CPSC took many impressive actions to protect consumer health and safety. The agency needs to improve its performance in other areas, including the toxic drywall problem.



CPSC appears, for the first time in years, to have leaders who support the mission of the agency, but it is still woefully underfunded and lacks a reliable solution for dealing with its largest challenge: dangerous imported products. The Obama Administration’s small budget increase request for CPSC did little to alleviate the agency’s dire situation. Nevertheless, inadequate funding did not completely prevent the agency from making progress in the area of consumer product safety this past year.

The agency took steps to improve toy safety and to provide timely warnings to consumers about potentially dangerous products. Despite lacking adequate legal authority to deal with the problem of imported products, the agency even made progress in this area by beginning to coordinate with public health officials and toy manufacturers in China. The agency’s inadequate resources did hamper its performance in other areas, however. The agency needs to improve implementation of its toy safety programs as well as the effectiveness of its product recalls. CPSC’s response to the toxic drywall crisis has been too slow and has lacked coordination with state health agencies. CPSC appears to be committed to improving its enforcement record, but time will tell whether the agency is willing and able to back up its promises of enhanced enforcement with real action. On the whole, it seems that the Obama Administration will be the first since the Carter Administration not to completely ignore this important agency, but more than attention is needed. The Administration must work to improve the agency’s budget and to ensure that it receives enhanced legal authority to tackle dangerous imported products.

## Report Card: Environmental Protection Agency (EPA)

The Environmental Protection Agency (EPA) is the largest and most powerful of the protector regulatory agencies. Whereas other protector regulatory agencies are primarily responsible for administering one central authorizing statute covering a discrete area of responsibility, EPA administers 12 separate laws covering a range of environmental issues, each with its own set of missions, mandates, and pollution control approaches. EPA regulates most polluting emissions into air, water, and soil; regulates the safety and purity of public drinking water; compels dump site owners to track and properly dispose of waste; and sets inspection requirements for motor vehicles.

Historically, EPA also has been one of the most effective protector agencies. During the Bush Administration, however, the agency's performance deteriorated significantly. More than perhaps any other agency, EPA has become the subject of intense political interference by Congress and the White House. Moreover, like other agencies, EPA has been crippled by leadership that is hostile to the agency's mission and by a lack of adequate resources. During his first year in office, President Obama's clear task was to reenergize EPA and transform it back into an effective protector agency. EPA's performance in 2009 can be measured by how well it responded to the important environmental and public health issues that it faced, including climate change, inspections and enforcement, risk assessment, toxics, children's health and safety, air pollution, water quality, mountaintop removal mining, and regulating hazardous waste.

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In this section, we evaluate EPA's performance in promoting public health and safety over the past year. This evaluation considers EPA's inspection and enforcement efforts, as well as at the protective actions it has taken or should have taken. To provide our evaluation with some context, we begin looking at the agency's leadership as well as the resources that have been made available to the agency.

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**Leadership.** EPA has endured many years without leaders who were committed to the agency's regulatory mission. One particularly egregious example is former EPA Administrator Stephen Johnson, the last one to serve during the George W. Bush Administration, who became infamous for allowing politics to trump science during his tenure.<sup>15</sup> The early indications suggest that the Obama Administration has picked professionals to lead EPA who are supportive of the agency's mission, with **EPA Administrator Lisa Jackson** representing this change in leadership throughout. Jackson, the former head of New Jersey's Department of Environmental Protection, led her state to implement automobile greenhouse gas (GHG) standards modeled after California's and has a reputation for being a strong administrator. Critics on the left say she has a track record of weak enforcement on toxic waste cleanup, however.<sup>16</sup>



JACKSON

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**Resources.** President Obama requested \$10.5 billion for EPA for Fiscal Year 2010—a 34-percent increase over the agency's previous fiscal year budget of \$7.8 billion. This marked the first time that the agency's budget had not been cut in eight years. (EPA suffered a 27-percent cumulative budget cut during the Bush Administration.) The request allocates the largest share of the budget, \$3.9 billion, to improve outdated clean water and drinking water infrastructure.

## Environmental Protection Agency (EPA)

Also, the budget request brings back the “polluter pays” principle for Superfund cleanups, adds new enforcement staff, funds Great Lakes restoration projects, and supports developing a greenhouse gas emissions registry. This infusion of funds is exactly what is needed for an agency long starved of resources, while facing an increasingly complex regulatory mission of protecting people and the environment.<sup>17</sup>

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**Inspections and Enforcement.** By and large, EPA missed the opportunity this past year to take any meaningful action to improve its record on inspection and enforcement. Instead, the agency continued to delay meaningful action by making promises or by developing new enforcement plans. The time for promises and more planning has long since passed. EPA must begin taking meaningful action with respect to its inspection and enforcement efforts in order to better protect the environment and public health. Some of the inadequate steps that EPA has taken on inspections and enforcement include:

- **EPA promised it will be more assertive in forcing states to bring their air quality regulations into compliance with federal law.** For example, the agency threatened to void a few of Texas’ air-quality regulations because they are weaker than federal law. The agency also is studying whether Texas oil refineries emit toxic air pollutants in excess of federal standards.<sup>18</sup> Previous administrations have made similar promises to step-up efforts to bring state air quality programs into compliance with federal law, however. Time will tell whether the Obama Administration means business this time.
- **Administrator Jackson ordered EPA’s Office of Enforcement and Compliance Assurance (OECA) to develop a Clean Water Enforcement Action Plan.** The Plan was released in October and contains many promising measures.<sup>19</sup> Again, however, planning is no substitute for meaningful action—especially when EPA’s record for Clean Water Act enforcement is in such dire shape. Indeed, the *New York Times* found in September a distressing trend of non-compliance with federal clean water regulations because of weak enforcement by EPA.<sup>20</sup> Perhaps this new enforcement program will produce a significant improvement when it is finally translated into action, but it offers little hope of protecting people and the environment in the near term.

**ASSESSMENT:** EPA failed to take any meaningful action on inspections and enforcement this past year. Instead, it has continued the trend of offering promises and undertaking new planning. EPA must begin taking meaningful action immediately if it is going to better protect people and the environment.

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**Protective Actions.** During the past year, EPA took several impressive protective actions in the areas of toxics reform, chemicals screening, climate change, ground level ozone, sulfur dioxide, lead air pollution monitoring, Chesapeake Bay cleanup, managing hazardous waste, and protecting children’s health and safety. In contrast, EPA’s response to issues like controlling perchlorate, atrazine, mercury air pollution, and water pollution from large concentrated animal feeding operations (CAFOs) was marked by delay or outright inaction. EPA’s implementation of the integrated risk information system (IRIS) database, efforts to address mountaintop removal mining and nonpoint source

## Environmental Protection Agency (EPA)

pollution, proposed limits on greenhouse gas (GHG) emissions from cars, and response to lead-safe home renovations were more mixed.

Steps Forward	Reasons for Concern
<p><b>Reconsidering Bush-era decision to deny California a waiver from the Clean Air Act.</b> This waiver would allow the state to regulate GHGs from cars more strongly than is currently required by federal law.<sup>21</sup></p>	<p><b>Delaying reversal of a Bush midnight regulatory decision not to set a health-protective standard for perchlorate—a component of rocket fuel—in drinking water.</b> Facing stiff opposition from the Department of Defense, the agency continues to endlessly study the chemical's hazards instead. The White House enabled this opposition when OIRA hosted a meeting at which the Department of Defense pressed EPA to refrain from regulating the chemical.<sup>22</sup></p>
<p><b>Issuing final endangerment finding on GHGs.</b> This finding requires the agency to regulate GHGs from cars and stationary sources.<sup>23</sup></p>	<p><b>Delaying action to strengthen standards for atrazine—a widely used but toxic herbicide—under the Safe Drinking Water Act.</b> The agency will instead study the chemical's health and environmental effects until at least 2011, even though the law requires the EPA to complete a review of the current standard by the end of 2009.<sup>24</sup></p>
<p><b>Proposing a rule for controlling GHGs from large stationary sources.</b><sup>25</sup></p>	<p><b>Delaying completion of technology-based regulations for air mercury pollution.</b> EPA opened the door for this stronger standard when it dropped its appeal of a court decision striking down the weak Bush-era mercury rule. The agency has put off completing the rule until November of 2011.<sup>26</sup></p>
<p><b>Proposing a new ground level ozone (or smog) air quality standard to replace the Bush Administration's heavily criticized 2008 standard.</b> The proposal would strengthen the public health and public welfare smog standards so that they fall within the ranges unanimously recommended by EPA's expert Clean Air Scientific Advisory Committee (CASAC).<sup>27</sup></p>	<p><b>Failing to reverse a Bush midnight regulation that makes it easier for large CAFOs to avoid regulation under according to the Clean Water Act's permitting program.</b> The regulation allows CAFOs to self-certify that they will not pollute, and thereby largely escape regulation.<sup>28</sup></p>
<p><b>Proposing a new rule for reducing sulfur dioxide pollution.</b> The agency had not sought to tighten these controls since 1971. The rule would improve monitoring and improve how the public is alerted to local short-term peaks in sulfur dioxide levels.<sup>29</sup></p>	
<p><b>Reconsidering a Bush midnight regulatory decision on lead pollution monitoring.</b> The decision exempted facilities emitting less than one ton a year of lead—a group that comprises a large number of lead polluters—from any monitoring requirements.<sup>30</sup></p>	
<p><b>Releasing Toxic Substances Control Act (TSCA) reform guidelines.</b> TSCA—the nation's primary law for promoting the safe use and management of chemicals—has barely worked over the 33 years since it was enacted. EPA's guidelines are a positive step.<sup>31</sup></p>	

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## Environmental Protection Agency (EPA)

Steps Forward	Reasons for Concern <span style="float: right;">(continued from previous page)</span>
<p><b>Launching “Chemical Action Plans” to jumpstart the agency’s implementation of TSCA.</b> EPA announced that it would begin a program to develop action plans for high concern chemicals. Under the program, EPA would seek to complete action plans for four to six chemicals in four- to six-month intervals. EPA included bisphenol A (BPA) and phthalates in its first group of high concern chemicals, because of their potentially harmful effects on children and fetuses.<sup>32</sup></p>	
<p><b>Dropping the ineffective Chemical Assessment and Management Program (ChAMP).</b> Developed during the Bush Administration, ChAMP was a chemical testing program that earned criticism for justifying inaction on toxic chemicals whenever scientific evidence of their harms was unclear. The program has been replaced by the chemical action plans program.<sup>33</sup></p>	
<p><b>Releasing draft strategy to improve the health of the Chesapeake Bay.</b> The strategy outlines a new framework that enables the federal government to hold states accountable for meeting cleanup goals.<sup>34</sup> In late December, the agency announced its plan for punishing states that fail to meet their goals for cleaning up the Bay or for setting their goals too low. The consequences might include changes in federal funding, rejections of permits for new factories, or tighter rules on farms.<sup>35</sup> It is still too early to tell whether EPA will use this enforcement authority effectively though. The Obama Administration gave EPA additional impetus to clean up the Chesapeake Bay by issuing an Executive Order ordering the agency to take specific measures to clean the Bay up.<sup>36</sup></p>	

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## Environmental Protection Agency (EPA)

Steps Forward	Reasons for Concern <span style="float: right;">(continued from previous page)</span>
<p><b>Reconsidering Bush midnight regulation that changed the definition of “solid waste” under the Resource Conservation and Recovery Act (RCRA).</b> The Bush definition excluded wastes destined for “recycling,” effectively deregulating the management of 1.5 tons of hazardous wastes. EPA studies show that recycling activities release toxic chemicals, seriously contaminating air, water, and soil.<sup>37</sup></p>	
<p><b>Revitalizing EPA’s Office of Children’s Health Policy.</b> The Office has become more influential in the agency’s regulatory decision-making, potentially leading to greater consideration of children’s unique health characteristics and stronger rules in areas of toxics, air pollution, and water pollution.<sup>38</sup></p>	
<p><b>Expanding stronger pesticides risk assessment agency-wide.</b> For years, EPA has conducted more protective risk assessments for pesticides used on food, as required by law, but it has used weaker risk assessments for pesticides used on non-food crops. Citing concerns over protecting children and pregnant farm workers, EPA proposed expanding the use of its stronger risk assessments to all pesticides.<sup>39</sup></p>	
<p><b>Expanding its definition of “mutagenic” to account for unique cancer threats for children.</b> The proposed definition expansion would include a broader spectrum of substances, subjecting them to stricter risk assessments designed to protect children. EPA’s risk assessment guidelines direct the agency to include an additional safety factor for substances determined to be mutagenic. The additional safety factor exists to account for the unique threat posed by childhood exposure to mutagenic substances.<sup>40</sup></p>	

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## Environmental Protection Agency (EPA)

Steps Forward	Reasons for Concern <span style="float: right;">(continued from previous page)</span>
<p><b>Launching its endocrine disruptor screening program.</b> This program provides a comprehensive approach to testing chemicals for potential endocrine disrupting effects. EPA finalized procedures for implementing the program, and began issuing orders to chemical manufacturers to test their products.<sup>40</sup> The program encountered interference from the White House early on, but it seems that the EPA now retains full authority over scientific decision-making for the program.<sup>41</sup></p>	
<b>Mixed</b>	
<p><b>In a positive step, EPA developed a new process for assessing toxic chemicals under the IRIS program, overturning a highly criticized Bush policy that formalized White House interference.</b> The effective operation of the IRIS program is important, because the toxicological profiles developed under the program serve as the scientific touchstone for health protective regulations for harmful chemicals. The new process seeks to increase public transparency and reduce political interference in the evaluation of toxic chemicals.<sup>43</sup> While these reforms will help, the new IRIS process still allows the White House and polluting agencies such as the Department of Defense to comment on draft assessments before the public sees them. Also, evaluating chemicals still takes too long—too many toxic chemicals are missing profiles in the IRIS database.<sup>44</sup> The agency has taken other promising steps with the IRIS program, however. EPA announced it would increase its capacity to implement the program with an increased budget of \$5 million and 10 new employees. Also, EPA unveiled a new, streamlined process in which agency scientists will systematically review old chemical profiles and update them with the latest toxicological information.<sup>45</sup></p>	
<p><b>EPA had a mixed record in dealing with the permits for mountaintop removal mining projects still pending at the beginning of 2009.</b> At first, the agency signaled it would proceed aggressively when it objected to two of the permits and held all of the remaining permits for preliminary review.<sup>46</sup> During the Bush Administration, such permits were generally approved without such reviews. Unfortunately, EPA appeared to abandon this approach when it completed its first round of reviews: the agency ultimately approved 42 of the 48 permits that it reviewed.<sup>47</sup> The results of the second round of reviews were more positive, though, as EPA blocked all 79 of the remaining permits, citing concerns about the projects’ water quality impacts.<sup>48</sup> EPA took another positive step when it announced it would revoke the mountaintop mining permit for what would have been the largest such project in West Virginia’s history, the first time since the Clean Water Act was enacted in 1972 that EPA has used its authority to veto a previously permitted project.<sup>49</sup></p>	
<p><b>EPA set specific, statewide numeric water quality criteria for nutrient pollution in Florida, marking the first time EPA has forced numeric limits for nutrient runoff for an entire state.</b> These criteria enable states to more readily develop Total Maximum Daily Loads (TMDLs), which assign pollution load reductions among point sources and nonpoint sources. In 1998, EPA required all states to develop numeric water quality criteria for nutrient pollution, providing that, when states fail to do so, EPA will establish necessary standards itself. EPA, unfortunately, has been reluctant to develop these criteria. A report by EPA’s Inspector General found that because of the agency’s lack of leadership, fully half of the states still have no numeric criteria for nutrients for any water body, and no state has complete numeric criteria for all types of water bodies.<sup>50</sup> EPA’s success in setting statewide criteria for Florida marks an important turning point, although it should be noted that EPA only acted as part of a settlement it reached after being sued for failing to set numeric criteria for Florida.<sup>51</sup></p>	

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## Environmental Protection Agency (EPA)

## Mixed

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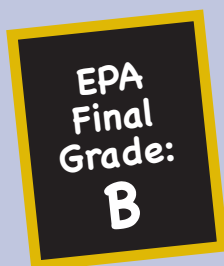
**EPA proposed rules for controlling GHGs from cars, but the proposed limit is too lenient.**<sup>52</sup> The proposed rule was based in part on a cost-benefit analysis. Because the agency massively underestimated the benefits of limiting climate change's effects, it was unable to justify stronger and more appropriate controls on tailpipe emissions of GHGs.<sup>53</sup>

**EPA proposed expanding lead-safe renovation rule.** The proposed rule expands on a 2008 rule that established safety guidelines for renovating and repairing certain older homes and schools that might contain lead paint. Citing concerns over children's and pregnant women's health, EPA's proposed rule would mandate these guidelines for all older homes.<sup>54</sup> Unfortunately, rather than taking this important action on its own, the agency proposed the rule change as part of a settlement agreement that it reached in a lawsuit brought by environmental and public interest organizations.<sup>55</sup>

## Incomplete

**EPA has been exploring options for regulating coal ash disposal.** Coal ash contains many toxics that can leach into surface and ground water, threatening the environment and human health. We are pleased to see the agency making progress on this long-neglected issue and considering regulating this waste as a hazardous waste under RCRA. Unfortunately, it seems that the agency is also considering regulating this waste as non-hazardous, or using a hybrid approach in which it regulates it as a hazardous waste only under certain circumstances. EPA still has not declared how it will regulate coal ash waste, although that has not stopped the coal power plant industry from using OIRA to try to intimidate the EPA into adopting a weaker regulatory program.<sup>56</sup> Time will tell whether EPA ignores this strong opposition and regulates coal ash as a hazardous waste, which provides the only guarantee that people and the environment will be adequately protected against this toxic threat.

**ASSESSMENT:** Overall, EPA's record of protective actions this past year has been very positive. It took some impressive action on important issues such as issuing an endangerment finding for GHGs, reducing sulfur dioxide pollution, and improving chemical screening and risk assessment. But its response to other issues—especially, the toxic chemicals atrazine and perchlorate—has been too slow. EPA has taken impressive steps on assessing chemical hazards, nonpoint source pollution, mountaintop removal mining, GHG emissions from cars, and lead-safe renovations, but more aggressive action is needed.



With leadership committed to the agency's regulatory mission and increased resources, EPA has made significant advances during President Obama's first year in office. The agency has made good progress in areas such as toxics reform, climate change, ground level ozone, sulfur dioxide, lead air pollution monitoring, Chesapeake Bay cleanup, managing hazardous waste, and protecting children's health and safety. EPA's regulatory performance this year has not been all positive, though. The agency has not yet taken concrete steps that improve its overall inspection and enforcement record. It has also been far too slow in taking regulatory action against perchlorate, atrazine, and mercury air pollution—chemicals that are particularly harmful to children—and it has made no progress controlling water pollution from large CAFOs. The agency's record was mixed in other areas, including chemical assessments under the IRIS program, mountaintop removal mining, nonpoint source pollution, greenhouse gas emissions limits for cars, and lead-safe home renovation. EPA made progress on the IRIS program and mountaintop removal mining, but it missed some opportunities for improving its performance in these areas. Improved progress

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## Environmental Protection Agency (EPA)

on the IRIS program is important, because the toxicological profiles generated under this program are used as the scientific touchstone for setting health-protective regulatory standards for harmful chemicals. The agency needs to be more proactive on nonpoint source pollution, the single largest threat to the environmental integrity of many water bodies in the United States, and lead-safe home renovation, an issue that primarily afflicts poor children and children of color. Finally, EPA has begun to address the issue of coal ash disposal, although, as this report goes to press, industry lobbying has once again delayed announcement of a concrete proposal.

## Report Card: Food and Drug Administration (FDA)

The Food and Drug Administration's (FDA) regulatory mission is among the largest and most complex of any of the protector agencies. FDA oversees products that account for a quarter of consumer spending in the United States, including:

- All over-the-counter and prescription medications;
- 80 percent of the food Americans eat (everything except for meat and poultry);
- All medical devices, such as heart valves and artificial hips;
- Most cosmetics; and
- Tobacco.

In recent years, FDA has had a number of high-profile failures, including, for example, the recent salmonella illness outbreak that has sickened 700 people and killed nine and the improper fast-tracking of approvals for medical devices. A reputation for ideological bias and close relationships with the industries under its watch has further tarnished the agency's public image. Morale in the agency has consequently plummeted. All the while, FDA has suffered from weak leadership and inadequate resources, making the achievement of its vast regulatory mission all the more difficult. During Obama's first year in office, FDA was presented with important tests in areas such as inspections and enforcement, tracking food-borne illness outbreaks, bisphenol A (BPA), over-the-counter drugs, dietary supplements, and postmarket drug safety.

In this section, we evaluate FDA's performance in promoting public health and safety over the past year. This evaluation considers FDA's inspection and enforcement efforts, as well as the protective actions it has taken or should have taken. To provide the evaluation with some context, we begin by looking at the agency's leadership as well as the resources that have been made available to the agency.

**Leadership.** In recent years, FDA has suffered under leaders who were not committed to the agency's regulatory mission. One egregious example is Lester Crawford, Bush's second FDA commissioner, who mysteriously resigned two months after his confirmation. Shortly thereafter, he was convicted of violating conflict-of-interest laws for failing to report that he owned stocks in companies he would be regulating as FDA head.<sup>57</sup> In contrast, the Obama Administration appears to have selected professionals for leadership roles at FDA who are supportive of the agency's mission.

- **FDA COMMISSIONER. Margaret Hamburg**, who was confirmed by the Senate on May 18, 2009, arrived with a reputation as an innovative, diligent, and respected expert in public health and safety. As the New York City health commissioner, Dr. Hamburg was credited with reducing tuberculosis rates, reducing infant mortality rates, and boosting child immunizations. Dr. Hamburg helped revive the city's demoralized and cash-starved health commission, something she will need to do at FDA.<sup>58</sup>



HAMBURG

## Food and Drug Administration (FDA)

- **PRINCIPAL DEPUTY COMMISSIONER.** Joshua Sharfstein is the former health commissioner for Baltimore. In that position, he led a push to limit the use and marketing of over-the-counter pediatric cough and cold medicines, which repeated studies have shown to be both ineffective and potentially dangerous.<sup>59</sup>
- **SENIOR ADVISOR TO THE COMMISSIONER.** Michael Taylor had an impressive career in food safety at the Department of Agriculture, where he instituted a comprehensive food safety management system known as Hazard Analysis and Critical Control Point (HACCP) for meat and poultry over strong industry opposition. As a scholar, Taylor has favored strong enforcement of food safety regulations and greater accountability for the food industry.<sup>60</sup> Critics on the left have raised concerns because he is a former Monsanto executive.



SHARFSTEIN



TAYLOR

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**Resources.** President Obama requested \$3.2 billion for FDA for Fiscal Year 2010, an impressive 19-percent increase over the agency's previous fiscal year budget of \$2.7 billion—and the largest budget increase in the agency's history. The expanded budget will allow FDA to strengthen inspections, and provide a needed funding boost to the agency's generic drug office so that it can quickly review the many applications for generic drugs that have been stuck there awaiting approval.<sup>61</sup> This large budget increase is an important beginning for an agency long starved of resources (adjusting for inflation, the agency's budget steadily declined between 1998 and 2007) and facing an increasingly complex regulatory mission (*e.g.*, the globalization of drug and food production, the advent of terrorist threat post 9/11, etc.).

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**Inspections and Enforcement.** Inspections and enforcement represents one area of major improvement at FDA during President Obama's first year in office. The most promising developments include:

- **Commissioner Hamburg has frequently and publicly committed FDA to aggressively enforcing laws and regulations—an important gesture given that the agency has acquired a reputation for having been captured by the industries that it is supposed to be regulating.**<sup>62</sup>
- **FDA is taking steps to increase its capacity to detect and respond to food-borne illness outbreaks.** For example, the agency has earmarked a portion of its budget increase for hiring more than 150 inspectors and scientists.<sup>63</sup>
- **Commissioner Hamburg announced that the agency would be following new enforcement guidelines intended to speed up and strengthen enforcement.**<sup>64</sup>
- **The agency initiated a pilot project in which it will work with public health officials in six states to create “rapid response” teams to quickly investigate food-illness outbreaks.**<sup>65</sup>
- **FDA has begun stationing mobile food safety laboratories at major ports of entry.** The labs will allow the agency to identify potential food safety problems from imported foods faster, enabling them to react more quickly and limiting exposure to food-borne pathogens.<sup>66</sup>

## Food and Drug Administration (FDA)

FDA’s inspection and enforcement of food safety recordkeeping requirements is still in need of major improvement:

**An investigation by the Inspector General for the Department of Health and Human Services suggests that FDA needs to improve enforcement of food safety recordkeeping requirements.** The investigation found that many food companies still do not comply with the requirements, because of the agency’s lack of enforcement.<sup>67</sup>

**ASSESSMENT:** FDA’s inspection and enforcement efforts have seen much improvement, but still lag in some areas.

**Protective Actions.** During the past year, FDA took some impressive protective actions with regard to tracking food-borne illness outbreaks, over-the-counter-medication, dietary supplements, and postmarket drug safety. FDA’s response to the public health threat posed by BPA, however, has been too slow.

Steps Forward	Reasons for Concern
<p><b>Announcing it would consider lowering the recommended dosages of acetaminophen and banning several popular prescription medications that combine the drug with narcotics, such as Vicodin and Percocet.</b> Although acetaminophen is generally regarded as safe, in high dosages it can be toxic, causing major liver damage or even death. The new rules are intended to reduce the chance of consumers unwittingly overdosing on the drug, which has become much easier now that it is available in multiple sources.<sup>68</sup></p>	<p><b>FDA has been far too slow in reversing a midnight regulatory determination that ruled that bisphenol A (BPA)—a hormone-disrupting chemical used in food packaging—was safe for all uses.</b> FDA’s own advisory board quickly rejected this ruling, noting that it was primarily based on two studies that had been financed by the plastics industry. Rather than taking any decisive action though, FDA is conducting yet another assessment of BPA’s risks.<sup>69</sup> When the agency did not meet its November 30 deadline for completing the new assessment, stating it needed to consider hundreds of new studies on the chemical’s effects, it promised to complete the study by the end of 2009.<sup>70</sup> FDA, however, also failed to meet this later deadline, angering public health advocates.<sup>71</sup> At this point, it is not clear if FDA will ever issue a new ruling on BPA. In the meantime, millions of dollars are being wasted and public health is being put at risk by this unnecessary delay.<sup>72</sup></p>
<p><b>Announcing it would boost efforts to control allegedly natural dietary supplements that illegally contain performance-enhancing drugs and undeclared pharmaceuticals.</b><sup>73</sup></p>	
<p><b>Warning consumers about potentially harmful dietary supplements.</b> Since last December, FDA has issued warnings about more than 70 weight-loss supplements containing ingredients that had been known to cause seizures, heart attacks, and strokes. In July, FDA also issued a warning for bodybuilding supplements that actually contained steroids.<sup>74</sup></p>	

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## Food and Drug Administration (FDA)

Steps Forward	Reasons for Concern <span style="float: right;">(continued from previous page)</span>
<p><b>Improving its oversight of postmarket drug safety.</b> A 2006 report by the Government Accountability Office (GAO) found that there was inadequate coordination between two FDA offices involved in postmarket safety, that the agency used unreliable data to identify postmarket safety issues, and that the agency’s system for tracking postmarket safety issues is inadequate. A 2009 follow-up report by the GAO found that FDA had made much progress in addressing each of these issues, but that a few problems remained.<sup>75</sup></p>	
<b>Incomplete</b>	
<p><b>FDA launched the Reportable Food Registry, a promising new electronic database that will likely help the agency to more quickly identify and respond to food-borne illness outbreaks.</b> FDA regulations require the food industry to self-report information about food-borne illness outbreaks. The success of the registry ultimately depends on how well the food industry actually reports this information. Time will tell if FDA is able to successfully implement the registry by getting the food industry to make timely and accurate reports about food-borne illness outbreaks.</p>	

ASSESSMENT: FDA took many impressive proactive actions to protect human health and safety, but its continued delay on BPA is disappointing.

FDA  
Final  
Grade:  
**B**

With leadership committed to the agency’s regulatory mission and increased resources, FDA has taken great strides forward during President Obama’s first year in office. The agency has made significant improvements in its overall inspection and enforcement record. It has also made good progress in areas such as food-borne illness outbreak tracking, over-the-counter medication, dietary supplements, postmarket drug safety—all important public health issues that have been ignored for far too long. FDA’s regulatory performance this year has not been completely positive, however. The agency has been far too slow in making a clear statement to the public about the health concerns related to the use of BPA in food packaging—a major threat to children’s health. Neither has FDA done enough to strengthen the enforcement of its food safety recordkeeping requirements. Although it made some progress, the agency still has a great deal of room for improvement in terms of ensuring food safety.

## Report Card:

### National Highway Traffic Safety Administration (NHTSA)

Over the years, the National Highway Traffic Safety Administration (NHTSA) has been hampered in the achievement of its regulatory mission by diminishing resources and increased political hostility towards regulation. NHTSA also faces some unique challenges. For one, it regulates the automobile industry, which has long wielded enormous political clout. Moreover, the agency faces a U.S. consumer culture that favors inherently unsafe small sports cars and large sports utility vehicles. Meanwhile, political hostility against regulation has led the agency to gradually shift its focus from improving vehicle safety to improving driver safety, an approach that has only a marginal effect on overall highway traffic safety. In addition, the increased focus on addressing climate change has led NHTSA to address fuel efficiency standards, shifting its already limited resources away from overall highway traffic safety. During the Bush Administration, NHTSA's efforts to fulfill its regulatory mission largely foundered. The Obama Administration has had plenty of opportunities to steer NHTSA in the right direction, as the agency sought to tackle issues like roof strength standards, side window safety, large truck braking, and improvement of car fuel efficiency.

In this section, we evaluate NHTSA's performance in promoting public safety over the past year. This evaluation looks at the protective actions NHTSA has taken or should have taken. To provide our evaluation of NHTSA's performance with some context, we begin by looking at its leadership as well as the resources that have made available to the agency.

**Leadership.** The NHTSA Administrator post still remains vacant after one year, hindering the agency's ability to aggressively pursue its regulatory mission:

- The Obama Administration's first choice for the post was **Charles Hurley**, the former head of Mothers Against Drunk Driving and the Insurance Institute for Highway Safety (IIHS). Many environmentalists opposed Hurley's nomination, because he had sided with automakers over the safety implications of downsizing vehicles to increase fuel efficiency while he was with the IIHS. Hurley withdrew his name in May, shortly after he was nominated, apparently because of this opposition.<sup>76</sup>
- The Administration did not find another candidate for the position until nearly seven months later, when it nominated **David Strickland**. A former senior Democratic counsel to the Senate Commerce Committee, he played a major role in pressing for environmental rules long fought by the U.S. auto industry.<sup>77</sup> He was confirmed on December 24, 2009.

**Resources.** President Obama requested \$867 million for NHTSA for Fiscal Year 2010—a tiny 1.3-percent increase over the agency's previous fiscal year budget of \$856 million. This budget increase is too small for an agency that is already stretched thin by its enormous regulatory mission. The agency's mission of reducing traffic fatalities is becoming more difficult, given that the numbers of cars, drivers, passengers, and vehicle miles traveled have all increased substantially in recent decades. The agency is also now playing a larger role in addressing climate change.

Another negative note about President Obama's budget request for NHTSA is that it did not do enough to shift the agency's limited resources away from the less effective driver safety programs

## National Highway Traffic Safety Administration (NHTSA)

and toward the more effective vehicle safety programs. To be sure, the budget did produce a small shift along these lines. The portion of the budget allocated to vehicle safety increased slightly to 15.0 percent as compared to 14.8 percent of the budget last year. Meanwhile, the portion of the budget allocated to driver safety decreased slightly to 84.6 percent as compared to 84.7 percent last year.<sup>78</sup> While this shift represents a step in the right direction in terms of increasing the effectiveness of NHTSA’s protective actions, it simply was not enough. This shift needs to proceed much more rapidly and to a much larger extent.

**Protective Actions.** Despite the lack of leadership and the continued budgetary shortfall, NHTSA took a number of important protective actions, especially with regard to improved roof strength standards, side window safety, large truck braking, and automobile fuel efficiency. While important, many of these accomplishments could be characterized as low-hanging fruit, however. In many cases, the agency did not do much more than finalize rules that the Bush Administration had been working on for years and that were due out anyway. The agency’s progress can be better assessed when it initiates its own protective actions that significantly reduce traffic fatalities and injuries.

Steps Forward	Reasons for Concern
<p><b>Doubling the required roof strength of standard passenger vehicles to safeguard drivers during rollovers.</b> Significantly, the new standard is based on a two-sided test, which requires that pressure be applied first to one side and then the other side of the roof. For years, safety advocates have urged NHTSA to use the two-sided test for developing roof standards. Unfortunately, this standard does not apply to convertibles.<sup>79</sup></p>	<p><b>Proposing corporate average fuel efficiency (CAFE) standards for U.S. passenger cars and light trucks that should have been stronger.</b> The new CAFE standards would be phased in for vehicles produced during the years 2012 through 2016, so that by 2016 new vehicles would achieve an average fuel efficiency of 35.5 miles per gallon (mpg). The current average is about 27.9 mpg. Under this timetable, the 35.5 mpg CAFE standard would be achieved four years earlier than was required by the 2007 energy bill.<sup>80</sup> The proposed standards offer a huge improvement, but they should have been stronger. The proposed rule was in part based on a cost-benefit analysis. Because the agency massively underestimated the benefits of limiting climate change’s effects, it was unable to justify a stronger and more appropriate set of new CAFE standards.<sup>81</sup></p>
<p><b>Establishing the first ever roof strength standards for full-sized pickups and sports utility vehicles (SUVs), though these standards are less stringent than for passenger vehicles.</b> SUVs and some pickups are especially susceptible to rollover accidents. Unfortunately, this standard for larger vehicles does not apply to 12- and 15-passenger vans.<sup>82</sup></p>	

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## National Highway Traffic Safety Administration (NHTSA)

Steps Forward	Reasons for Concern <span style="float: right;">(continued from previous page)</span>
<p><b>Proposing a new rule that would require automobile manufacturers to strengthen side-window protections to prevent passengers from being ejected in rollover crashes even if they are not wearing seat belts.</b> The proposal leaves it to car companies to decide how they will comply with the new standard. Most will likely enhance their side air bags. Others might strengthen windows by using many layers of glazed glass.<sup>83</sup></p>	
<p><b>Issuing a new braking standard for large trucks that effectively requires stopping distances to be reduced by as much as 30 percent.</b> Once fully implemented, the agency expects the new standard will save 227 lives and avert 300 serious injuries per year.<sup>84</sup></p>	
<p><b>Issuing a proposed rule that would require tire manufacturers to label their tires with specific information regarding the tire's likely impact on an automobile's fuel efficiency.</b> The standardized tire efficiency labels will enable consumers to choose replacement tires that would reduce their overall fuel consumption.<sup>85</sup></p>	

ASSESSMENT: NHTSA has taken some important steps in the past year to improve vehicle safety and to increase automobile fuel efficiency, though many of these accomplishments involved only finalizing some pending Bush-era rules.

NHTSA  
Final  
Grade:  
**B-**

Even without an Administrator and a continued lack of resources, NHTSA made some progress this year in improving overall traffic safety. The agency took important steps to strengthen roof strength standards, increase side window safety, and reduce large truck braking distances. The agency deserves only partial credit for many of these accomplishments though, since it did little more than finalize some pending rules from the Bush Administration. The agency did not really launch any of its own protective initiatives during the past year. NHTSA also made some progress in improving automobile fuel efficiency, by raising the CAFE standard for cars manufactured between 2012 and 2016 and by standardizing tire efficiency labels. Unfortunately, the CAFE standard that NHTSA proposed was not as strong as it should have been. NHTSA has yet to take effective action with respect to SUV rollover threats and small car safety improvements.

## Report Card:

### Occupational Safety and Health Administration (OSHA)

The Occupational Safety and Health Administration (OSHA) has been a regulatory wasteland over the past few decades. Political interference, outdated laws, and chronic underfunding have reduced the agency's regulatory output to a mere trickle—and that is not for lack of new safety hazards in the workplace. During the past decade, OSHA issued comprehensive workplace regulations for only two chemicals, even though it has established legally enforceable exposure limitations for fewer than 200 of the approximately 3,000 chemicals that EPA characterizes as “high production volume” chemicals. Many existing standards have not been updated in 40 years.

Outdated laws and inadequate resources have also hindered OSHA's ability to inspect workplaces and enforce worker safety regulations. In 2006, OSHA fielded 2,165 inspectors to cover more than 133 million workers and 8.7 million workplaces. The agency averages about 40,000 inspections annually, employing a variety of tactics to pick the worst industries, worst workplaces, and emerging hazards. At this rate, it would take 212 years for OSHA inspectors to visit all the workplaces under its jurisdiction as of 2006. Even worse, OSHA lacks legal authority to impose anything but small penalties even for the most egregious violations. For example, penalties are capped at \$70,000 per incident even for “willful violations,” which involve situations where an employer demonstrates “plain indifference to the law.” OSHA also has been too willing to cut deals and let employers off the hook. The average penalty for enforcement cases involving fatalities in Fiscal Year 2007 was just \$10,133. During President Obama's first year in office, OSHA dealt with inspections and enforcement issues, workplace hazard communication, combustible dust, diacetyl, beryllium, process safety management, and cranes and derricks safety.

In this section, we evaluate OSHA's performance in promoting worker health and safety over the past year. This evaluation considers OSHA's inspection and enforcement efforts, as well as the protective actions it has taken or should have taken. To provide our evaluation with some context, we begin by looking at the agency's leadership as well as the resources that have been made available to the agency.

**Leadership.** OSHA's capacity to fulfill its regulatory mission has been hampered by a lack of leadership this past year. President Obama's nominee for OSHA Administrator, **David Michaels**, was not confirmed by the full Senate until December 4.<sup>86</sup> Michaels has excellent credentials for the position. An epidemiologist and research professor at the School of Public Health and Health Services at George Washington University, Michaels has long studied the health effects of occupational exposure to toxic chemicals. Michaels has also written extensively about how industries have become proficient at attacking agency science in order to avoid being regulated.<sup>87</sup>



MICHAELS

**Resources.** President Obama requested \$564 million for OSHA for Fiscal Year 2010, which is \$51 million, or 10 percent, more than that agency received for Fiscal Year 2009. This large budget request represents an important step in reviving this chronically under-resourced agency. Significantly, much of the budget increase will be dedicated to the agency's two greatest

## Occupational Safety and Health Administration (OSHA)

needs: rulemaking and inspections. The agency intends to hire 20 new staff for its rulemaking office. In addition, the agency will also hire 130 new inspectors, which would represent a 6 percent increase over the agency's number of inspectors in 2006.<sup>88</sup> Many of the new inspectors will be bilingual, which is important given that the number of Spanish-speaking workers who have been injured or killed has risen significantly over the last couple of decades.<sup>89</sup>

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**Inspections and Enforcement.** Inspections and enforcement represents one area of major improvement at OSHA during President Obama's first year in office. The most promising developments include:

- **Key figures such as Secretary of Labor Hilda Solis and Acting OSHA Administrator Jordan Barab have publicly and repeatedly acknowledged that OSHA needs to improve its enforcement efforts.**<sup>90</sup>
- **OSHA assessed the largest fine ever in its history: \$87 million for BP's safety violations and failure to correct hazards at the Texas City refinery where a 2005 explosion killed 15 workers and injured 170.** OSHA proposed the highest monetary penalty available for every violation.<sup>91</sup>
- **OSHA is working to improve its Enhanced Enforcement Program after a scathing review by the agency's Inspector General (IG).**<sup>92</sup> According to the IG's report, the program, which was intended to focus the agency's enforcement on the worst offenders, has suffered from poor implementation. Acting Administrator Barab announced that the agency has already begun instituting changes in the program.<sup>93</sup>
- **OSHA is working to improve the Voluntary Protection Program (VPP).** Under the VPP, the agency seeks to work with management and labor in certain industries to cooperatively develop comprehensive health and safety management systems for those industries. In exchange, the participating industries are exempted from regular inspections, and they are granted leniency for violations that are discovered on unannounced inspections, provided that they correct the violation quickly. A recent report by the Government Accountability Office (GAO) criticized the program for (a) not having a clearly positive impact on worker health and safety, and (b) not properly dealing with participants who had deaths or other incidents at their worksites.<sup>94</sup> Acting Administrator Barab announced that the agency would reevaluate the program as part of a comprehensive effort to address the concerns raised in the GAO report.<sup>95</sup>
- **OSHA started a recordkeeping National Emphasis Program to assess the accuracy of injury and illness data recorded by employers.** Under this program, OSHA would do targeted inspections at worksites in high-hazard industries that have low numbers of reported injuries and illnesses, and appropriately enforce regulatory requirements whenever employers are found to be underreporting injuries and illnesses.<sup>96</sup>
- **OSHA is improving its oversight of state worker protection programs.** Roughly half the states have been approved by the agency to operate their own occupational safety and health enforcement programs. The agency announced it was going to review the policies and procedures of all of these state-run programs. OSHA just completed the first of these reviews for Nevada's program. This review revealed a number of serious concerns with the

## Occupational Safety and Health Administration (OSHA)

program’s operation, including failure to appropriately cite willful and repeat offenses, poorly trained inspectors, and a lack of follow-up.<sup>97</sup>

- **OSHA launched a huge enforcement sweep of construction sites in Texas.** To support the effort, the agency brought inspectors from other regions to conduct unannounced inspections. OSHA focused on Texas because it has the highest rate of construction fatalities in the country. Typically, construction sites are not open long enough to be subjected to an unannounced inspection. As a result, these inspections have had little deterrent effect on recalcitrant construction site operators. OSHA intended for the temporary surge in inspections to overcome this problem, however.<sup>98</sup>

**ASSESSMENT:** OSHA has taken a number of positive steps to improve its inspection and enforcement efforts, including reviewing ineffective enforcement programs and launching some promising new ones. The large fine it assessed BP suggests that the agency will be more aggressive in its enforcement actions.

**Protective Actions.** During the past year, OSHA took impressive protective action with regard to notifying workers of chemical hazards. In contrast, OSHA has been far too slow in taking regulatory action on combustible dust, beryllium, process safety management, and cranes and derricks safety. The agency’s response to controlling diacetyl has been more mixed.

Steps Forward	Reasons for Concern
<p><b>Proposing a stronger hazard communication (HazCom) rule.</b> This rule requires employers to ensure that workers have adequate information about the hazardous characteristics of workplace chemicals and about relevant protective measures. The rule would harmonize the U.S. HazCom standard with the United Nations Globally Harmonized System of Classification and Labeling of Chemicals (GHS). While far from perfect, the GHS represents an improvement over the current U.S. HazCom standard.<sup>99</sup></p>	<p><b>Delaying the development of a rule for controlling combustible dust.</b> Combustible dust tends to accumulate in some workplaces and can result in catastrophic explosions. The agency announced that it would issue an advanced notice of proposed rulemaking (ANPRM), instead of working on a proposed rule. This ANPRM step is unnecessary and will only delay the final rule’s completion.<sup>100</sup></p>
	<p><b>Delaying efforts to update and strengthen its rule for beryllium.</b> Beryllium is a light-weight metal that causes lung cancer and other severe health problems. The agency announced that it will put its risk assessment of the chemical through peer review, starting in March of 2010. This unnecessary step will only delay the final rule’s completion.<sup>101</sup> (By way of comparison, the Department of Energy has a separate up-to-date standard for beryllium that is 10 times stronger than the current OSHA standard.)<sup>102</sup></p>

(continued on next page)

## Occupational Safety and Health Administration (OSHA)

Steps Forward	Reasons for Concern <span style="float: right;">(continued from previous page)</span>
	<p><b>Failing to begin updating its process safety management (PSM) standard.</b> The PSM standard requires employers to take specific steps to prevent the release of highly hazardous chemicals in the workplace. Congress has been urging OSHA to update this standard for years.<sup>103</sup> Instead of working on a rule, the agency is studying the problem.<sup>104</sup> While these studies will likely generate useful information for improving the existing PSM standard, they are also delaying development of this important rule.</p>
	<p><b>Delaying completion of a rule setting stronger safety standards for cranes and derricks.</b> A rule that has the support of both workers and the construction industry has been ready for more than a year. Nevertheless, the agency announced in December that the rule would likely not be finalized until July of 2010.<sup>105</sup></p>
Mixed	
<p><b>OSHA first expedited development of a rule for diacetyl, but then later slowed it down again.</b> Diacetyl is a chemical used in food flavorings that has been linked to lung disease in exposed workers and consumers. First, the agency announced it is withdrawing a pending ANPRM for the rule, and would begin developing the rule instead. This ANPRM step is unnecessary and would only have delayed the completion of a final rule.<sup>106</sup> Later, OSHA announced that it would put its risk assessment of the chemical through peer review, starting in October of 2010. This unnecessary step will delay the final rule's completion.<sup>107</sup></p>	

ASSESSMENT: OSHA needs to improve its performance on taking protective actions. The agency began work on such issues as its HazCom standard and diacetyl. Overall though, the agency has been slow in addressing important worker health and safety issues.

**OSHA  
Final  
Grade:  
C**

This past year saw OSHA shake off a lot of cobwebs, but it is far from revitalized. The agency took some impressive steps in strengthening its inspection and enforcement efforts. The agency also made some important progress on developing a HazCom rule and a diacetyl standard. In many cases, though, its progress on taking protective actions has been too slow and cautious. The huge budget increase OSHA received should help to improve the agency's confidence and sense of mission, allowing it to continue on its promising upward trajectory. OSHA's performance will likely improve in the coming years now that it has an Administrator that seems committed to the agency's regulatory mission. In the meantime though, U.S. workers will continue to be insufficiently protected against workplace hazards.

## Report Card: The White House

The White House has an enormous influence over the performance of regulatory agencies. Previous presidential administrations have become more and more directly involved in the regulatory process, often interfering with the expert judgments of the very regulatory agencies in which Congress has placed the authority to carry out the various environmental, health, and safety statutes. The President has many ways to influence regulatory performance. Whether or not he provides agencies with adequate budgetary resources and leadership committed to the agencies' regulatory missions will affect how well those agencies are able to carry out those missions. More importantly, the President can affect the regulatory process—both for good and bad—by altering the rules of regulatory process—that is, the procedures by which regulations are made. During President Obama's first year in office, the White House has been able to affect the performance of regulatory agencies through its management of the Office of Information and Regulatory Affairs (OIRA), its budgetary requests, its stimulus bill investments, its promotion of transparency, and its adherence to principles of scientific integrity.

In this section, we evaluate the White House's regulatory performance in promoting public health and worker safety over the past year. This evaluation considers the White House's management of OIRA, its budgetary requests for the protector agencies, its stimulus bill investments that bear on regulation and enforcement, its efforts to promote transparency, and its efforts to promote scientific integrity.

**Management of OIRA (Office of Information and Regulatory Affairs).** During the first year of his administration, President Obama's White House has had a poor track record in terms of its management of OIRA—a tiny bureau within the White House Office of Management and Budget that wields an enormous amount of influence over the U.S. regulatory system. OIRA may well continue to serve as a deregulatory force, as it did during the George W. Bush Administration. Some of the more disappointing developments relate to President Obama's pick for OIRA Administrator, OIRA's management of the regulatory review process, and OIRA's continued interference in agency science.

- **President Obama's selection of Cass Sunstein for the position of OIRA Administrator—the so-called “Regulatory Czar”—suggests that OIRA will continue to serve as a deregulatory force during his Administration.**

In his extensive scholarship, Sunstein has embraced cost-benefit analysis (CBA) enthusiastically.<sup>108</sup> By authority of Executive Order, OIRA can review every big regulation developed by regulatory agencies to ensure that it passes a CBA test. Historically, OIRA has used CBA to torpedo or weaken important health, safety, and environmental regulations. Time will tell whether Sunstein will lead OIRA in a new direction or if he will continue its deregulatory legacy.



SUNSTEIN

- **In implementing the regulatory review process, OIRA has continued to provide polluting agencies such as the Department of Defense with a venue in which to attack health, safety, and environmental regulations.** In June, OIRA hosted a meeting in which Department of Defense representatives sought to pressure EPA into abandoning reconsid-

## The White House

eration of a Bush midnight regulatory decision not to regulate perchlorate. Perchlorate is a toxic chemical that is used in rocket fuel; its regulation under the Safe Drinking Water Act would impose significant regulatory costs on the Department of Defense. The meeting appears to have worked, as EPA has taken steps to delay regulating perchlorate.<sup>109</sup>

- **In implementing the regulatory review process, OIRA has also continued to provide polluting industries with a venue in which they can attack regulatory agencies and their health, safety, and environmental regulations.** Through the first year of the Obama Administration, OIRA has met dozens of times with outside groups to discuss health, safety, and environmental regulations. All but five of those meetings have been dominated by industry representatives complaining about proposals under development at EPA, FDA, and NHTSA.<sup>110</sup> If OIRA is going to continue hosting meetings regarding individual rules that are under review, then it should ensure that it is hearing a balanced set of views—and not just those of industries concerned about regulatory costs.
- **In implementing the regulatory review process, OIRA has continued to provide polluting industries with a venue in which to attack protector agencies while they are still in the pre-rule stage of developing a regulation.** In one particularly disappointing example, OIRA hosted 17 meetings with polluting interests regarding the EPA's preliminary work on a rule to regulate the disposal of toxic coal ash.<sup>111</sup>
- **OIRA's implementation of the regulatory review process continues to be marked by a lack of transparency.**<sup>112</sup> OIRA should begin posting online all of its communications, both incoming and outgoing, with agencies and stakeholders about rules and other regulatory decisions that it chooses to monitor. OIRA should also begin keeping and posting online minutes of all its meetings regarding rules that it has under review.
- **OIRA submitted comments on EPA's toxicological profiles of three chemicals that the agency was including in its Integrated Risk Information System (IRIS) database.** In these comments, the OIRA staff member chided EPA scientists for allegedly ignoring evidence that made the three harmful chemicals look less bad.<sup>113</sup> OIRA, an office composed almost entirely of economists, generally lacks the institutional competence to weigh in on complex scientific issues that are best left to agency experts. OIRA also has no jurisdiction over toxicological profiles because they are pre-regulatory decisions.
- **OIRA sought to change EPA's endocrine disruptor screening program in ways that would have made it difficult for the agency to force pesticide manufacturers to conduct up-to-date tests on the potentially harmful effects of dozens of chemicals.** As originally designed, the program put the burden on the pesticide manufacturers to justify not conducting the new tests. OIRA tried to change the program so that the burden shifted to EPA to justify why the new tests should be conducted.<sup>114</sup> In most cases, this burden shifting would have left EPA with access to only old and outdated scientific studies of these chemicals—studies that were not designed to determine whether the chemicals had potential endocrine disrupting effects. To the credit of the White House, however, OMB Director Orszag wrote a letter stating unequivocally that EPA has the final word on scientific issues in its endocrine disruptor screening program.<sup>115</sup>

## The White House

The Obama Administration did take one positive step with regard to its management of OIRA:

- **President Obama revoked Executive Order 13422, a Bush-era Executive Order that made OIRA's regulatory review process more stringent.**<sup>116</sup>

But uncertainty persists over how OIRA will operate in the future—most notably with respect to how it will conduct individualized review of regulations:

- **President Obama announced he would develop a new Executive Order guiding the institution of regulatory review at OIRA to replace the current one, Executive Order 12866.**<sup>117</sup> His Administration has not released the new Executive Order, so it is not clear yet whether it will represent an improvement. The process of developing a new Order began positively when the Obama Administration asked for public comments about what should be included in the new Order.<sup>118</sup> Since then, however, the process of developing the new Order has suffered from a lack of transparency. OMB Director Peter Orszag was supposed to deliver to President Obama a set of recommendations in May, but it is not clear whether that ever happened.<sup>119</sup> The Administration has not revealed if the new Order has been completed, what provisions it contains, and when it will be released.

**ASSESSMENT:** The White House needs to make huge improvements in its management of OIRA. Its actions to this point suggest that OIRA will continue to serve as a deregulatory force during the remainder of Obama's Administration.

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**Budget Requests.** On the whole, the Obama Administration took steps in the right direction in terms of requesting more resources for the protector agencies. The most promising budget requests included:

- **EPA.** President Obama requested \$10.5 billion for EPA for Fiscal Year 2010—a 34-percent increase over the agency's previous fiscal year budget of \$7.8 billion. This marked the first time that the agency's budget had not been cut in eight years. (EPA suffered a 27-percent cumulative budget cut during the Bush Administration.)<sup>120</sup>
- **FDA.** President Obama requested \$3.2 billion for FDA for Fiscal Year 2010. This was an impressive 19 percent increase over the agency's previous fiscal year budget of \$2.7 billion—and the largest budget increase in the agency's history.<sup>121</sup>
- **OSHA.** President Obama requested \$564 million for OSHA for Fiscal Year 2010, which is \$51 million, or 10 percent, more than that agency received for Fiscal Year 2009.<sup>122</sup>

Not all of the President's budget proposals were positive. In particular, President Obama requested only small budget increases for two agencies that have historically been under-resourced:

- **CPSC.** President Obama requested only \$107 million for CPSC—an increase of less than 2 percent over the agency's budget of \$105 million for Fiscal Year 2009. Worse, President Obama's budget request is about 10 percent short of the amount authorized by Congress; the Consumer Product Safety Improvement Act provided that CPSC could receive up to \$118 million in FY 2010.<sup>123</sup>
- **NHTSA.** Obama requested \$867 million for NHTSA for Fiscal Year 2010—only a disappointing 1.3 percent increase over the agency's previous fiscal year budget of \$856 million.



## The White House

The request reversed a long-standing trend in NHTSA's previous budgets by shifting the agency's limited resources away from the less effective driver safety programs and toward the more effective vehicle safety programs, but this shift needs to be bigger and fast.<sup>124</sup>

**ASSESSMENT:** It was encouraging to see the Obama Administration request budget increases for all of the protector agencies, but the budget proposals for the CPSC and NHTSA requested increases that were smaller than what is needed to revitalize these important agencies.

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**Stimulus Bill Investments.** President Obama proposed—and Congress passed—American Recovery and Reinvestment Act of 2009. This \$787.2 billion economic stimulus bill included an estimated \$71 billion worth of investments in so-called “green initiatives,” including energy conservation and efficiency, mass transit projects, and environmental cleanup. Overall, the bill provided investments in a number of important environmental projects. Some of the more important green initiatives included:

- \$4.5 billion for energy efficiency renovations in federal buildings using green technology;
- \$11 billion to modernize the nation's electric grid and develop smart-grid capabilities;
- \$5 billion for the Weatherization Assistance Program to help low-income families reduce their energy costs by weatherizing their homes and to make our country more energy efficient;
- \$9.3 billion for investments in rail transportation, including Amtrak, high speed, and intercity rail;
- \$6 billion for local clean water and drinking water infrastructure improvements; and
- \$1.2 billion for EPA's nationwide environmental cleanup programs, including Superfund.<sup>125</sup>

**ASSESSMENT:** The Obama Administration included some impressive environmental investments in its stimulus bill.

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**Transparency.** The Obama Administration took a very positive step in terms of promoting transparency by issuing a new memorandum on how government agencies are supposed to respond to requests made under the Freedom of Information Act (FOIA):

- **The President Obama memo on FOIA, which was issued on his first full day in office, instructed agencies to administer FOIA with a presumption of openness—that is, when in doubt about whether a request asks for information that might be covered by a specified exemption from FOIA, the agency is supposed to disclose the information.**<sup>126</sup> This reestablishes the presumption of openness that existed during the Clinton Administration, but which was reversed during the Bush Administration. The presumption of disclosure established by President Obama's memo is consistent with Congress' intent in creating FOIA.<sup>127</sup>
- **President Obama has taken encouraging steps to demonstrate that the White House will abide by the presumption of openness established by his memo on FOIA.** For example, the President's decision to release legal memoranda authorizing torture demonstrates his commitment to disclosure.<sup>128</sup>

## The White House

The Obama Administration's work on its Open Government Initiative<sup>127</sup> needs improvement, however. On the positive side, through its development of the Initiative, the Administration is giving the important issue of government transparency more than just lip service. It is also positive that the Administration engaged the public in the process of developing its Open Government Initiative. Overall though, the process by which the Open Government Initiative was developed was marked by a number of missteps, and the final product contained some troubling provisions:

- **For the most part, the process of developing the Open Government Initiative was marked by confusion and, ironically, a lack of transparency.**<sup>130</sup> For example, after the public participation process concluded in the summer, the Administration made no mention of the Open Government Initiative until it released the final draft in December.
- **The final draft of the Administration's Open Government Initiative<sup>131</sup> contained a number of mandates for regulatory agencies.** These mandates place a large burden on regulatory agencies that are already struggling with the challenge of fulfilling their difficult regulatory mandates with inadequate resources—even though few of these agencies suffer from the kind of calamitous transparency problems that catalyzed this effort in the first place. Instead, the Open Government Initiative should have taken a more targeted approach by focusing on areas in the government where there is greatest need for increased transparency. One obvious place to begin would be OIRA, which wields a great deal of influence over regulatory decisions and regulatory science in relative obscurity.

**ASSESSMENT:** The Obama Administration took an impressive step on transparency policy with its FOIA memo, but its Open Government Initiative was, on the whole, disappointing.

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**Scientific Integrity.** During the past year, the Obama Administration took some promising steps in terms of promoting scientific integrity by undertaking its Scientific Integrity Initiative.<sup>132</sup> The Administration gave the important issue of scientific integrity more than just lip service, and actively engaged the public in the process of developing its Scientific Integrity Initiative.<sup>133</sup> Overall though, the process by which the Initiative was developed was marked by a number of missteps:

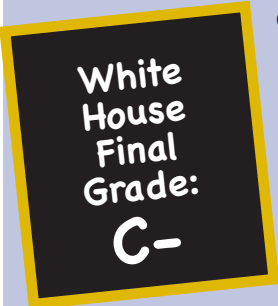
- **In March, the Obama Administration issued a memorandum to all agency heads on Scientific Integrity, in which it directed John Holdren, the Director of the White House Office of Science and Technology Policy, to develop a plan to achieve a goal of “ensuring the highest level of integrity in all aspects of the executive branch’s involvement with scientific and technological processes.”**<sup>134</sup> The memo hinted at a number of very encouraging ideas that reflect a significant change in attitude from the Bush Administration regarding the issues of scientific integrity.
- **The process of developing the Scientific Integrity Initiative has been hampered by a lack of transparency.** The original memo from President Obama directed Holdren to deliver his scientific integrity plan to the President by July. That deadline came and went without any announcement from the Administration regarding whether Holdren met the deadline or not.<sup>135</sup> Presently, it is unclear what the current state of the Scientific Integrity Directive is, what recommendations and mandates it contains, and when it will finally be released.

## The White House

Unfortunately, the Obama Administration's actual adherence to scientific integrity principles has been disappointing:

- **The continued interference in agency science by OIRA is clearly inconsistent with the principles of scientific integrity.** We hope that the Obama Administration explicitly addresses the issue of scientific interference by OIRA in the final draft of its Scientific Integrity Initiative.

**ASSESSMENT:** The Obama Administration's Scientific Integrity Initiative is positive in theory, but the Administration has not yet produced a final draft. OIRA's continued interference in agency science suggests that the Administration still has some progress to make on its own adherence to scientific integrity principles.



Overall, the White House's participation in the regulatory process is in need of serious improvement. OIRA has done little to demonstrate that it intends to give up the role it played during the Bush Administration—that of being a barrier to effective regulations. Indeed, indications are that OIRA will continue to operate as a deregulatory force. President Obama's budget requests marked an improvement over the Bush Administration, but some of the requests—most notably for CPSC and NHTSA—were too small to reverse the chronic underfunded state in which these agencies operate. Similarly, the Administration's proposed stimulus bill contained a number of impressive investments in environmental initiatives. President Obama's performance on transparency and scientific integrity issues was generally positive, but there were troubling aspects in both. The Obama Administration has a lot of room for improvement if it intends to promote a regulatory system capable of protecting people and the environment.

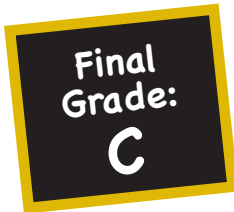
## Report Card: Cross-Cutting Regulatory Issues

This report evaluated the Obama Administration’s performance in terms of protecting public health, safety, and the environment by assessing the individual performance of the key participants in the U.S. regulatory system in these areas—namely, the five protector agencies and the White House. On the whole, the Obama Administration is unequivocally heading in the right direction—particularly by comparison to the Bush Administration—despite working under extraordinarily difficult circumstances. Nevertheless, the Administration’s performance still fell short of the distinctly positive vision of government that President Obama articulated while on the campaign trail: in many cases, the protector agencies approached their regulatory missions too cautiously, and in a few cases, the White House continued to operate as a barrier to the kind of regulations that are needed to protect people and the environment.

So far, this report has focused on the overall performance of particular agencies. The assessments that follow examine the Administration’s progress in a number of specific issue areas—some of which cross agency lines. Examining the Administration’s work in this somewhat more holistic method offers important insights into what has and has not yet been accomplished on a number of important health, safety, and environmental issues.

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**Midnight Regulations.** The Obama Administration’s progress on reversing “midnight regulations”—the regulations finalized in the Bush Administration’s last days in office—has been mixed. Of all of the protector agencies, only EPA had a large number of significant midnight regulations with which to contend. (Many of the bureaus within the Department of the Interior were also burdened with a large number of troublesome midnight regulations, but those fall outside the scope of this report.)

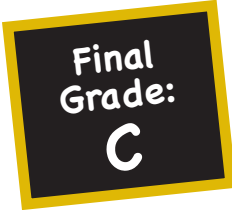


The Obama EPA has taken at least two positive steps to reverse the Bush Administration’s effort to solidify its disturbing legacy of weak regulatory protections: it agreed to reconsider the Bush-era decision not to monitor lead air pollution from small stationary sources for enforcement purposes, and it has begun taking steps to reverse a regulation that changed the definition of “solid waste” to exempt billions of pounds of hazardous waste from regulation.

EPA’s efforts to reverse many other midnight regulations have been too slow or non-existent. For example, EPA continues to study perchlorate, instead of reversing the Bush Administration’s decision not to set a health-protective standard for restricting the chemical’s presence in drinking water. Likewise, EPA has not made any effort to reverse a midnight rule that allows many CAFOs to self-certify that they will not pollute, and thereby largely escape regulation under the Clean Water Act’s permitting program.

## Cross-Cutting Regulatory Issues

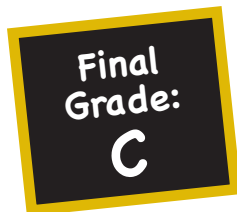
**Toxics.** The Obama Administration has a mediocre record addressing specific toxics and other harmful substances. Unnecessary delays have plagued EPA's response to perchlorate, atrazine, and mercury; FDA's response to BPA; and OSHA's response to diacetyl and beryllium. OIRA economists continued to try to undermine the toxicological profiles in EPA's integrated risk information system (IRIS) databases. For its part, CPSC has poorly executed its investigation of the toxic drywall crisis.



EPA has taken steps to add new and review old toxicological profiles for its IRIS database more quickly, but it stopped short of implementing all necessary reforms—the process of adding new profiles is likely to continue to be too slow. Moreover, OIRA remains involved in the review process. CPSC has taken promising steps to protect children from toxic toys, such as developing a new labeling requirement, but the agency has ineffectively implemented the third-party testing requirements for ensuring that toys are free of phthalates or excessive lead.

EPA's support for legislation to reform TSCA is positive, as are its efforts to reverse the midnight regulation on lead air pollution monitoring and to expand its regulation on lead-safe home renovations. FDA has also made commendable efforts to address the public health harms caused by over-the-counter drugs and dietary supplements. The White House also contributed by proposing a stimulus bill that contained significant investments in Superfund cleanups.

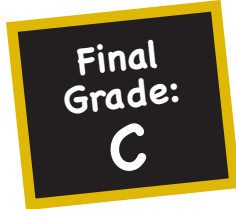
**Children's Health and Safety.** The Obama Administration has taken several steps to deal with hazards that uniquely affect children, but many of its efforts have been plagued by implementation problems, unnecessary delay, and interference from the White House. EPA has been especially effective in promoting children's health and safety. The agency has revitalized its Office of Children's Health Policy, agreed to reverse the Bush midnight regulation on lead air pollution monitoring, improved its risk assessment processes to account for children's unique physiology, undertaken action plans on BPA and phthalates, and proposed expanding a rule intended to protect children from lead exposure in the home, a problem that primarily afflicts poor children and children of color.



On the other hand, EPA has not taken any decisive regulatory action against perchlorate, atrazine, and mercury; nor has the FDA taken any decisive action against BPA—all substances that pose particular hazards for children. The White House has also made it difficult for the EPA to protect children. OIRA served as a venue for the Department of Defense's efforts to quash EPA action on regulating perchlorate in drinking water. OIRA also attempted to change EPA's endocrine disruptor screening program, which would make it more difficult for the agency to get up-to-date testing on chemicals that might be harmful to children. CPSC's efforts to protect children from toxic toys have been more positive, but implementation problems have undermined the effectiveness of its toxic toys testing program.

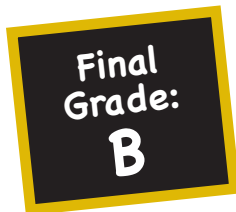
## Cross-Cutting Regulatory Issues

**Water.** The Obama Administration made some progress cleaning up the nation's waters this past year, but overall its performance in this area needs substantial improvement. On the positive side, EPA strengthened its clean-up efforts for the Chesapeake Bay and began curtailing the practice of mountaintop removal mining, which can have catastrophic consequences on rivers and streams. EPA was further spurred to clean the Bay when the Obama Administration issued an Executive Order on the Bay—the first of its kind—declaring that the Bay was a natural treasure and ordering the agency to take specific measures to clean it up. The White House also contributed by proposing a stimulus bill that included significant investments in water treatment infrastructure.



EPA's response to other clean water issues, however, was lackluster. The agency released a new enforcement plan for the Clean Water Act instead of taking meaningful action to ensure that polluting industries come into compliance with Clean Water Act regulation. It has been slow in preventing toxics such as atrazine and mercury from entering the nation's waterways. EPA's implementation of the national pollutant discharge elimination system (NPDES) program for CAFOs needs real improvement. In reducing pollution from nonpoint sources, EPA has had limited success—setting specific, statewide numeric water quality criteria for nutrient pollution in Florida but only after being prodded to act by a lawsuit. Last but not least, Administrator Jackson's promises to strengthen the enforcement program in this vital area have yet to be implemented.

**Air.** The Obama Administration has made progress on cleaning up air pollution during this past year, but much work remains. EPA has begun to strengthen regulations on ground level ozone, sulfur dioxide, and lead air pollution. EPA's response to reducing mercury air pollution, however, has been far too slow. It is still too early to tell whether the agency's efforts to bring state air quality programs into compliance with the Clean Air Act will be effective.



## Cross-Cutting Regulatory Issues

**Climate Change.** Climate change is the area where EPA has made the most progress, although the mixed results of the Copenhagen summit may have detracted attention from those commendable efforts. The first positive step came almost immediately when EPA reconsidered the Bush-era denial of California's waiver from the Clean Air Act so that the state could impose stricter limits on GHG emissions from cars. EPA took other impressive steps when it proposed regulations for limiting GHG emissions first from cars and later from large stationary sources. EPA recently issued its final endangerment finding, laying the groundwork for the agency to regulate GHGs from cars and stationary sources. NHTSA has also taken initial steps to address climate change, working to increase automobile fuel efficiency by strengthening the CAFE standard for most passenger vehicles and by implementing new rules on improving fuel efficiency labels for new tires. Unfortunately, EPA's and NHTSA's regulations on GHG emissions from cars and fuel efficiency were not as strong as they need to be. The White House contributed by proposing a stimulus bill with a number of climate friendly investments, such as energy efficiency and public transportation projects.

We recognize that the mixed results of the Copenhagen negotiations were less than what many environmentalists had hoped for. It is nevertheless commendable that key members of the Administration including President Obama, Secretary of State Hillary Clinton, and Secretary of Energy Steven Chu attended the conference and played an active role in the negotiations. We also recognize that the Senate's inability to move climate change legislation makes further progress nationally and internationally uncertain. This report, however, grades the Obama Administration's regulatory efforts on their own merits.

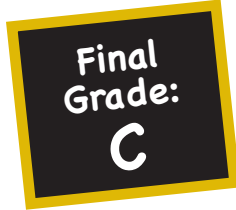
**Transparency.** The Obama Administration took important steps to promote transparency in the regulatory system, but overall this new transparency policy was disappointing. The White House directed federal agencies to follow a presumption of openness when responding to Freedom of Information Act (FOIA) requests. The White House also launched an impressive effort to develop a new administration-wide statement on transparency policy called the Open Government Initiative. Unfortunately, the White House's implementation of this effort was at times plagued by missteps. Also, the recommendations included in the final draft of the Initiative were disappointing because they placed additional burdens on the protector agencies and overlooked executive departments like OIRA that are most in need of increased transparency.

Final  
Grade:  
A

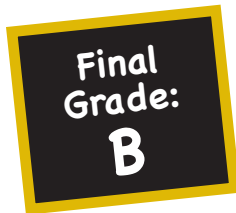
Final  
Grade:  
B

## Cross-Cutting Regulatory Issues

**Scientific Integrity.** The Obama Administration took steps to promote the principles of scientific integrity in the regulatory system, but did not always uphold these principles in practice. The White House launched an effort to develop a new administration-wide statement on scientific integrity policy called the Scientific Integrity Initiative. Unfortunately, the White House has yet to implement this plan. OIRA's continued interference in agency science suggests that the White House must also improve its own adherence to scientific integrity principles.



**Budget Requests.** On the whole, the Obama Administration took steps in the right direction in terms of requesting increased resources for the protector agencies, although none of these increases has yet come close to bringing the agencies' resources in line with their expansive mandates. Two decades of steadily declining budgets have left the agencies so starved for resources that they cannot possibly accomplish the majority of the statutory mandates assigned to them by Congress. For example, EPA had not received an increase in funding in real dollars since the mid-1980s, before passage of the 1990 Clean Air Act Amendments and other ambitious amendments to the Clean Water Act, Safe Drinking Water Act, and hazardous waste laws.



To begin reversing these trends, President Obama requested \$10.5 billion for the EPA for Fiscal Year 2010—a 34-percent increase over the agency's previous fiscal year budget of \$7.8 billion, marking the first time that the agency's budget had not been cut in eight years. He requested \$3.2 billion for FDA for Fiscal Year 2010, an impressive 19-percent increase over the agency's previous fiscal year budget of \$2.7 billion—and the largest budget increase in the agency's history. President Obama requested \$564 million for OSHA for Fiscal Year 2010, which is \$51 million, or 10 percent, more than that agency received for Fiscal Year 2009. He only requested small budget increases for CPSC and NHTSA, however, and it will take significantly more funding for the agencies to come close to reaching full performance capacity.



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