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Thank you, Chairwoman Miller, Ranking Member Lynch, and Members of the Subcommittee, for giving me the opportunity to comment on congressional regulatory reform initiatives.

The Competitive Enterprise Institute (CEI) is a free-market public policy group focusing on regulatory issues. My testimony is largely based on two CEI reports: the just-published 2005 edition of economist Wayne Crews' annual survey of federal regulatory trends, called *Ten Thousand Commandments*; and my March 2005 report, *Reviving Regulatory Reform: Options for the President and Congress*. I am pleased to provide copies of both reports for the press and Members of the Subcommittee.

I. Why Reform?

An old adage tells us that, "If it ain't broke, don't fix it." We have to be clear about what ails us before we can sensibly evaluate potential remedies. What are the main defects or flaws of the federal regulatory system, and how serious are they?

First, regulatory costs are large, growing, and, what is more disturbing, uncontrolled.

The Office of Management and Budget's (OMB) 2005 draft report to Congress on federal regulation estimates that the annual costs of 45 major federal rules reviewed by OMB during 1994-2004 range from $34.8 billion to $39.4 billion.[1] But those 45 rules are only a tiny fraction of the 4,000-plus rules agencies promulgate every year. Moreover, OMB's "estimate" is actually a guesstimate. OMB simply aggregates the cost estimates furnished to it by the agencies, but does not audit the agencies' analyses, vouch for their accuracy, or check the original cost projections against later cost data. OMB states that the total cost of all federal rules, major and minor, now in effect "could easily be a factor of ten or more larger" than its estimate for the 45 major rules.[2]

Even multiplying OMB's guesstimate by a factor of ten may understate regulatory costs, because it would not capture the economy-wide repercussions of the occasional regulatory disaster.

Consider the effects of botched regulatory policy on the telecommunications industry. The 1996 Telecom Act, as interpreted and implemented by the Federal Communications Commission (FCC), subjected local telephone companies to a convoluted system of price controls while forcing incumbents to lease their facilities to challengers at below-market rates. The easy availability of cross-subsidies attracted large numbers of new entrants, creating a classic bubble of too many companies chasing too few customers.[3] At the same time, construction and equipment purchases fell sharply. New entrants saw no need to build, because they could lease incumbents' facilities on the cheap; and incumbents feared that assets they might build would just end up subsidizing rivals.[4]

This "what's yours is mine" regime of bureaucratic micro-management inflicted trillion-dollar losses on a major high-tech industry. It contributed to and prolonged the recent

recession, during which some 2.8 million manufacturing jobs disappeared. None of these costs are reflected in OMB's report.

The telecom debacle aside, several types of data indicate that regulatory burdens are growing:

- The number of *Federal Register* pages per decade has increased dramatically, from 170,325 in the 1960s, to 450,821 in the 1970s, to 529,233 in the 1980s, to 622,368 in the 1990s, to 732,798 in the 2000s (based on a 5-year average).[5]
- The *Code of Federal Regulations* has grown from 22,877 pages in 1960 to 102,195 pages in 1980, to 147,639 pages today.[6]
- Federal fiscal expenditures to develop and administer rules, measured in year 2000 constant dollars, have grown from $21.4 billion in 1995, to $25.7 billion in 2000, to an estimated $36.6 billion in 2004.[7]
- The average number of rules finalized during 2000-2004 is 4,172 per year, lower than throughout the 1990s, but output remains consistently above 4,000 final rules per year.
- Agencies take more regulatory than deregulatory actions. From 1997 through the end of the Clinton Administration, 78 percent of major final rulemakings increased rather than decreased regulatory burdens. From the start of the Bush Administration through the end of 2003, 75 percent of major final rulemakings increased rather than decreased regulatory burdens.[8]

In part, regulatory costs are growing because they are uncontrolled. Many rules function as implicit taxes, their costs embedded in the prices we pay for goods and services. Some affect growth, employment, and innovation. Yet, nothing in the current process requires or even allows elected officials to make explicit choices about the costs of regulatory programs. Regulatory costs accumulate as if by stealth.

Which brings us to a second major defect of the regulatory status quo: *Americans live under a regime of regulation without representation*.

Most regulatory decisions are made by bureaucrats—officials over whom "We, the people" have little if any control. Elected officials enact the broad regulatory statutes that govern the activities of various industries and sectors. However, Congress and the president delegate to non-elected officials the tasks not only of developing and proposing the implementing rules, but also of enacting them. Thus, elected officials largely escape responsibility for the associated costs and red tape—they only approved the law, not the regulation. As a consequence, consumers and taxpayers—those who ultimately bear the burdens and reap the benefits of regulation—cannot reward or punish anyone at the ballot box for good or bad regulatory decisions.[9]

The Constitution may not be perfect—but it is certainly better than what we have today! Congress's delegation of legislative power to administrative agencies and regulatory commissions flouts the letter and spirit of Article I §1, which vests "all legislative

powers" in Congress—not in administrative agencies. Nowhere does the Constitution authorize Congress to delegate legislative powers to other branches or bodies.

In the political theory underpinning the Constitution, governments derive "their just powers from the consent of the governed."[10] This means that all powers—legislative, executive, and judicial—originate in the people, and legitimate government arises from a compact whereby the people agree to delegate certain powers to certain offices or institutions. In a regime of delegated powers, officials are the *stewards*, not the owners of power. Just as legislatures have no right to seize powers the people have delegated to the executive, so they also have no right to transfer to the executive powers the people have delegated to them.

Because Congress delegates legislative power to agencies, it has little incentive to consider cost when drafting regulatory statutes, and almost none to insist that regulators develop economically sensible rules.

Only stale habit prevents us today from seeing the enormity of this problem. Regulations are rules of conduct with the force and effect of law. Many regulations are also implicit taxes, increasing the cost to consumers of goods and services. If asked whether bureaucrats should have the power to make laws and raise taxes, most Americans would unhesitatingly say no. Yet bureaucratic taxing and lawmaking has been business as usual in Washington for decades.

I am pleased to say that all the legislative proposals the Subcommittee is considering today address this problem. Rep. Hayworth's bill explicitly aims to enforce compliance with Article I §1, and would require Congress and the president to approve agency rules before they can take effect. Rep. Kelly's bill would enhance Congress's analytic resources to review federal rules. The bills introduced by Rep. Brown-Waite and Rep. Ney would create new joint committees for carrying out Congress's regulatory review responsibilities. CEI strongly supports all these initiatives.

II. Policing Reforms

During the past three decades, Congress has adopted, debated, or considered numerous regulatory reform proposals. The specific provisions or elements of these initiatives typically fall into one of two main categories: *policing* reforms and *checks and balances* reforms. Policing reforms aim via rules of rulemaking and centralized review to *regulate the regulators*. Checks and balances reforms seek to increase Congress's responsibility for regulatory decisions, foster inter-agency competition, or enable outside experts to compete with agency experts.

Both types will be needed to make the regulatory system more affordable and accountable. However, a word of caution is in order. In the past, reformers have relied heavily on policing reforms. Pinning their hopes on what James Madison called "parchment barriers,"[11] they have proceeded as if agencies could be legislated or

managed into practicing sound science and economics. The results have been disappointing.

Regulatory agencies exist to regulate, and they know more about their business than anyone else. They often figure out how to sidestep procedural constraints or criteria or bend them to their advantage. Consider the following examples.

Paperwork Reduction Act

Since at least 1942, Congress has sought to rein in federal paperwork burdens. In 1980, Congress and President Carter enacted the Paperwork Reduction Act (PRA), creating an Office of Information and Regulatory Affairs (OIRA) charged with minimizing paperwork. In 1995, Congress amended the PRA to set statutory paperwork reduction goals. The Act has been a persistent failure. Not only are burdens not reduced, they continually increase.

Part of the reason is that Congress keeps changing the tax code, and even changes that reduce the tax burden generate new paperwork. [12] But part of the reason is that agencies just don't care. As the Government Accountability Office (GAO) delicately puts it, internal agency review of information collection requests "has been reduced to a routine administrative process, rather than the rigorous analytical process envisioned by Congress, and does not appear to be effective in reducing the burden."[13] GAO also hints that agency reporting may understate actual paperwork burdens, because estimating burden hours is more art than science.[14]

Unfunded Mandates Relief Act (UMRA)

Title II of UMRA requires agencies to prepare a regulatory impact analysis (RIA) for any rule likely to cause lower-level governments to increase their aggregate annual expenditures by $100 million or more. The U.S. Environmental Protection Agency (EPA) estimated that the cost to states, territories, and tribal governments of its Total Maximum Daily Load (TMDL) Clean Water Act rule would not exceed $25 million annually—and thus exempted itself from having to conduct an RIA.[15] EPA's estimate seems contrived. State water pollution control administrators estimated the TMDL rule would cost $670 million to $1.2 billion annually.[16]

Regulatory Flexibility Act (RFA) and Small Business Regulatory Enforcement Fairness Act (SBREFA)

The RFA, enacted in 1980, requires each agency to determine whether its proposed and final rules will have a "significant economic impact on a substantial number of small entities." Unless the agency certifies that a proposed rule will not have such impact, and explains the reasons for such certification, it must prepare and publish in the *Federal Register* a regulatory flexibility analysis explaining the steps the agency took and the alternatives it considered to reduce small entity costs. More often than not, agencies ignored these requirements and paid scant attention to small business concerns.

In 1996, Congress enacted SBREFA to amend and put teeth into the RFA. SBREFA authorized courts to review agencies' compliance with the RFA, allowing small businesses to sue agencies for improper certification and failure to perform the requisite analyses. However, agencies have deeper pockets than small businesses, and SBREFA does not provide damage awards to winning plaintiffs.

More importantly, under SBREFA, as under the original RFA, agencies may exempt themselves from the Act's analytical requirements by certifying that a proposed rule will not have a "significant economic impact on a substantial number of small entities." GAO found that during SBREFA's first three years, EPA certified that 96 percent of its rules had no significant small entity impacts—up from 78 percent in the pre-SBREFA period. GAO suggests that EPA took advantage of the fact that SBREFA does not define what Congress meant by "significant economic impact" and "substantial number of small entities." For example, EPA certified that an August 1999 proposed rule to lower Toxic Release Inventory reporting thresholds would not have significant small entity impacts even though EPA estimated the rule would impose costs between $5,200 and $7,500 apiece on 5,600 small firms.[17] In practice, agencies have broad discretion to decide when the Act's requirements do or do not apply.

Regulatory Accounting and Centralized Review

Since the early 1970s, every president has required agencies to undertake some form of regulatory accounting, and implemented some type of central review.[18] Through executive orders and best practices documents, presidents and OMB have attempted to improve and standardize the analyses agencies undertake to develop and justify their regulatory programs. A recent GAO workshop involving 16 experts found that despite general improvement over the years, the quality of agency analyses "is still highly variable," and agency economic assessments are often "insufficient to inform decision makers whether proposed regulations and programs are achieving goals cost effectively or generating net benefits for the nation." Barriers to improvement include "a lack of demand from many decision makers to know the full costs of federal programs."[19]

Congress, for its part, has directed OMB to report on the costs and benefits of federal rules since 1996, and made that requirement permanent when it enacted the Regulatory Right to Know Act (Section 624 of the Treasury and General Government Appropriations Act of 2001). The Act requires OMB, in an annual accounting statement and associated report, to estimate the costs and benefits of federal rules in the aggregate, by agency, by program, and by major rule.

As noted earlier, this report merely compiles rather than audits agency estimates; it is not the "accounting statement" Congress wanted. In fact, as economist Richard Belzer explains, the report presents a highly distorted picture of regulatory costs and benefits:

> If errors were random, estimates of aggregate costs and benefits might be highly imprecise but they would be unbiased. However, there is both persuasive theory

> and consistent evidence that agency cost estimates are biased downward and agency benefit estimates are biased upward. When OMB aggregates dozens of downwardly biased cost estimates and upwardly biased benefit estimates, the total cost of federal regulation is understated by a lot and the total benefit of federal regulation is overstated by a lot.[20]

Agency cost-benefit assessments are unavoidably self-promotional—justifications for actions that the agency, for whatever reasons, wants to take. Why does the OMB report accept them at face value? As AEI-Brookings scholars Robert Hahn and Erin Layburn point out, the agency heads, the OMB director, and the OIRA administrator all work for the same administration and are appointed by the same president. No administration welcomes the airing of internal criticism or policy disputes. There is an inherent conflict between OMB's duty to police agency actions and its interest in advancing the president's political and policy agendas.[21]

To put it bluntly, OMB is a watchdog in constant danger of becoming a rubber stamp. The short-lived revival of the dreaded "return letter" appears to be a case in point. In 2001, OIRA Administrator John Graham chided Clinton's OMB for sending "exactly zero return letters to agencies for poor quality analysis" during the last three years of the Clinton Administration.[22] Dr. Graham vowed to revive the return letter as a stick to prod agencies into compliance with presidential criteria for cost-benefit analysis. OMB's Web site shows the following number of return letters: 14 in 2001, five in 2002, two in 2003, one in 2004, and none in 2005.[23]

Look Back Provisions

Section 5 of President Clinton's Executive Order 12866, *Regulatory Planning and Review*, requires each agency to implement a program under which it "will periodically review its existing significant regulations to determine whether any such regulations should be modified or eliminated."[24] Similarly, Section 610 of the RFA requires agencies to review small business rules within 10 years of taking effect to determine whether the regulation should be continued, revised, or rescinded.[25]

These requirements have largely been honored in the breach. Notes William Kovacs of the U.S. Chamber of Commerce: "nearly all of the items listed in the spring 2004 edition of the *Unified Agenda of Federal Regulatory and Deregulatory Actions*…involve new regulatory proposals, and the Unified Agenda does not even list existing regulations subject to review under Section 5 of Executive Order 12866."[26] GAO's workshop found that "in general federal agencies often do not assess the performance of regulations or existing programs retrospectively," and that "mechanisms often do not exist for determining whether actual performance is similar to predicted effectiveness."[27] OIRA Administrator John Graham similarly observes that most of the major rules OMB reviewed prior to publication "have never been evaluated to determine whether they have worked as intended and what their actual costs and benefits have been."[28]

Although plugging loopholes in policing reforms may have value—and I offer several suggestions in Appendix A—history suggests that agencies are artful dodgers and it is not always in OMB's interest to rein them in.

III. Checks and Balances Reforms

Some initiatives aim to inject checks and balances into the regulatory process, either by increasing Congress's responsibility for regulatory decisions, fostering inter-agency competition, or enabling outside experts to compete with agency experts. Notable examples include UMRA's point of order provision, elements of the RFA/SBREFA as strengthened by Executive Order 13272, and the Congressional Review Act.

UMRA's Point of Order Provision

UMRA requires agencies to prepare cost-benefit assessments of any rule (subject to exceptions) that may impose $100 million or more in compliance expenditures (a typical policing measure). In addition, UMRA requires the Congressional Budget Office (CBO) to determine whether bills approved by authorizing committees contain mandated expenditures and, if so, whether the direct costs are $50 million or more annually to lower-level governments or $100 million or more annually to the private sector. More critically, UMRA enables any member of Congress to raise a point of order against the consideration of legislation if it contains unfunded intergovernmental mandates exceeding $50 million. If the Chair sustains the point of order, the House or Senate has to debate and vote on whether to proceed with consideration of the bill. In effect, UMRA gives lawmakers an opportunity to affirm or deny that the benefits of a bill's unfunded mandates justify the costs before voting on the bill itself.

CBO analysis suggests that UMRA has reduced both the number and cost of unfunded mandates enacted by Congress.[29] Since passage of UMRA, the number of annual agency actions affecting state governments has fallen from 784 in 1994 to 507 in 2004—a 35 percent decline, while the number of annual agency actions affecting local governments has fallen from 533 in 1994 to 338 in 2004—a 38 percent decline.[30] This is rather remarkable, because, during the past 10 years, UMRA's point of order has almost never been invoked. Just having this option on the books seems to have a moderating effect. UMRA would be more effective if it (a) required lawmakers to cast separate votes on mandates costing $50 million before voting on the underlying legislation, and (b) applied to private-sector as well as intergovernmental mandates.

In any event, UMRA illustrates the utility of making elected officials take more responsibility for regulatory decisions.

SBREFA as Strengthened by Executive Order 13272

To strengthen RFA/SBREFA, President Bush, on August 13, 2002, issued Executive Order 13272, "Proper Consideration of Small Entities in Rulemaking." E.O. 13272 requires agencies to notify the Small Business Administration's Office of Advocacy of

draft rules expected to have a significant impact on small entities, and to consider Advocacy's comments and respond to them in the final rule. It also requires Advocacy to provide regular training to all rulemaking agencies on how to comply with the RFA.[31]

Advocacy not only finds flaws in agency certifications and flexibility analyses, it also corrects many of them. Changes agencies made in their rules responsive to Advocacy's interventions in FY 2003 reduced small business regulatory costs by more $6.3 billion in the first year and more than $5.7 billion on an ongoing annual basis.[32] In 2004, Advocacy helped save small entities more than $17 billion, for a total of $64 billion in cost savings since the start of the Bush Administration.[33]

These achievements derive from an important albeit usually neglected principle of regulatory reform: competition. Instead of attempting to manage the regulators, Advocacy competes with them (while of course providing technical assistance and friendly advice). Advocacy offers critical analysis and policy alternatives on behalf of a constituency with an indefeasible interest in cost control. In so doing, Advocacy provides partial relief from the monopoly each agency otherwise maintains over regulatory analysis and deliberation.

IV. Reform Principles and Politics

Although rules of rulemaking are necessary, policing reforms generally produce meager results. What is more, they lack popular appeal and are easily caricatured as green-eye shaded attempts to subvert public protections. CEI President Fred Smith hardly exaggerated when he described the prevailing spin on the Contract with America's cost-benefit and risk assessment proposals: "Mad-dog Republican ideologues collude with robber-baron capitalists to regain the right to put poison in baby food bottles." Even scaled-back versions of those proposals crashed and burned in the 105th and 106th Congresses.

Reformers, however, did enact UMRA and SBREFA. As noted, UMRA's point of order provision limits the number and size of new regulatory mandates affecting state and local governments. SBREFA, augmented by E.O. 13272, enables Advocacy in some measure to check and balance the rulemaking agencies.

The real if limited success of these reforms derives from both their principles and their politics. Not everybody likes cost-benefit analysis or centralized review, but everybody professes to like good government. UMRA embodies the good government principles of cost disclosure (in the form of CBO reporting on the cost of mandates in new legislation) and congressional accountability. E.O 13272 embodies the good government principle of competition.

The constituencies benefiting from these reforms enjoy broad public support and are politically mobilized. UMRA benefits state and local governments, which have considerable influence in both major parties, Congress, and the White House. SBREFA/E.O. 13272 benefits small business, which also wields great influence.

These simple reflections suggest that reformers should concentrate on initiatives that (1) visibly embody good government principles and (2) credibly advance the interests of state and local governments, small business, or both.

V. Two Applications

Appendix A includes several examples of proposals that fit those criteria. These include extending UMRA's point of order protection to the private sector, establishing a Congressional Regulatory Office, and codifying E.O. 13272 to consolidate and expand Advocacy's role in the regulatory process.

Two applications merit a more extensive discussion.

Create a Competitive Market for Regulatory Analysis

Although citizens are free to submit comments on regulatory proposals and even offer alternative cost-benefit estimates, the agencies ultimately decide which estimates are best. This is problematic, because it allows agencies to have the final say in grading their own work.

Executive orders like President Clinton's E.O. 12866 and statutes like UMRA and SBREFA create a large demand or *market* for regulatory analysis, but it is a market in which the agencies face little or no competition. As we learned in Economics 101, monopoly leads to high cost and poor quality.

Economist Rick Belzer offers an elegant solution: allow outside analyses to compete with agency analyses on a level playing field. "The Regulatory Right-to-Know Act," he notes, "gives OMB the responsibility for informing Congress concerning the benefits and costs of federal regulation, but it doesn't give OMB any statutory authority to determine whose estimates are most reliable." Congress could remedy that asymmetry by authorizing OMB, for each major rule, to hold a contest and pick a winner.[34]

The agencies monopolize the power to score regulatory proposals, but they have no monopoly on regulatory expertise. Businesses, think tanks, universities, corporations, small business associations, and state governments employ hundreds, perhaps thousands of professionals trained in economic and scientific analysis. "Open the door to competition by creating a market for high-quality, policy-neutral, and independent regulatory analysis, and they will respond," says Belzer. "The agencies also will respond—first by trying to undermine the legitimacy of their competitors, and once that fails to work, by improving the quality of their own work to avoid being driven out of the regulatory analysis business."[35]

Under Belzer's proposal, OMB would invite the public to submit analyses of regulatory proposals, and then use a procedure known as "Final Offer Arbitration" (FOA) to select the best one. He explains:

> A restricted form of FOA is used by Major League Baseball to decide whether the player's or the team's estimate of market value is most reasonable. Unlike other forms of arbitration, in FOA the arbitrator cannot negotiate amongst contending parties or devise face-saving compromises intended to ensure that everybody "wins." Because arbitrators can easily and quickly discard extreme or flamboyant positions, FOA discourages competing parties from exaggerating the strengths of their own case and the weaknesses of the others'.[36]

FOA is a winner-takes-all system. OMB would not be allowed to split the difference between, or combine elements of, competing analyses. OMB would have to select one analysis as the best. This would put pressure on all contenders to clarify assumptions and uncertainties and use sound science and economics. Thus, for example, to have a realistic chance of winning, an agency's analysis of a proposed rule would have to visibly conform to OMB's best practices and information quality guidelines.

Some might object that authorizing OMB to determine whose analysis is best would simply transfer monopoly power from the agencies to OMB, giving undue influence to the president or his appointees. That is a valid concern, but it is easily addressed. "If for whatever reason you do not have sufficient trust in OMB's judgment," says Belzer, "ask the General Accounting Office to evaluate the same information and reach its own conclusions. Even OMB can benefit from some competition."[37]

Require Congressional Approval before New Rules Become Effective

Congress would have much greater motivation to consider economic impacts when drafting regulatory statutes, and to insist that agencies consider low-cost and non-regulatory alternatives, if it had to approve final agency rules before they can take effect.

Such a plan is indeed more radical than most other regulatory reform proposals, but its radicalism lies in its fidelity to America's founding principles. "No regulation without representation" clearly echoes the words and philosophy of those who signed the Declaration of Independence. No other big-ticket regulatory reform initiative has as great a potential appeal to common-sense populism. Regulations are implicit taxes that have the force of law. To most Americans, it is obvious that nobody but their elected representatives should have the power to make laws or raise taxes.

Recasting regulatory reform as congressional reform would have obvious rhetorical advantages. How many members of Congress will want to defend the proposition that they should take no responsibility for rules promulgated under the statutes they enacted? How many public interest groups will want to argue that voters should have no one to hold accountable for regulatory burdens and red tape?

Small businesses and state governments constitute a natural support base for this approach. They are far better represented in Congress than they are in the federal regulatory bureaucracy. A Congress accountable for regulatory decisions would be far

more reluctant to pass unfunded intergovernmental mandates and far more aggressive in demanding agency compliance with the RFA.

An obvious objection is that Congress could not manage the increased workload if it had to approve 4,000-plus new regulations ever year. However, Congress could streamline a regulatory review process in several ways to ensure that it does not crowd out other essential business. Congress could limit the time allotted to debate individual rules, and limit the types of rules eligible to be debated. Congress could approve each agency's minor rules as a non-amendable package through an up-or-down vote—the procedure used to close and consolidate obsolete military bases.

Congress could also implement an accountability regime in phases, to allow for trial-and-error learning. For example, during the first two years, Congress could review only economically significant rules—those likely to have annual economic impacts of at least $100 million. The FY 2003 *Unified Agenda of Federal Regulatory and Deregulatory Actions* listed 127 new economically significant rules under consideration at the pre-rule, proposed rule, final rule, long-term, and recently completed stages. Of these, only 22 were completed agency actions.[38] Congress unquestionably could review 22 or even several dozen economically significant final rules per year without shortchanging other important business.

In later years, as Congress becomes more familiar with the process, the review threshold could be lowered to include rules imposing $50 million or more in costs on lower-level governments or the private sector, or $25 million or more on small business. All other rules—about 97 percent of the total—could be handled through various expedited procedures.

V. Conclusion

Regulatory reform is an enterprise fraught with political risk. However, the regulatory status quo is itself a source of great risk, as the regulation-induced telecom meltdown and its economic repercussions show. If war is too important to be left to the generals, then regulation is too important to be left to the regulators. Elected officials should take more responsibility for regulation, and agency experts should have to compete for public approbation with non-agency experts.

Regulatory reform is difficult, but "noble things are hard."[39] Or as we hear in sports all the time: No Guts, No Glory. Alexander Hamilton called "love of fame" "the ruling passion of the noblest minds."[40] If even a few policymakers seek the honor of renewing America's constitution of liberty, regulatory reform may yet have a political future.

APPENDIX A: COMPENDIUM OF REGULATORY REFORM OPTIONS

- ***Amend the Telecommunications Act.*** Make clear that the goal is to deregulate the telecom industry; set schedules to phase out price controls and forced-access regulation; establish regulatory parity for telephone, cable, and wireless carriers by removing, not increasing, regulatory burdens; and, prohibit state and local governments from balkanizing information networks and telecom markets.

- ***Publish an Annual Regulatory Report Card.*** OMB should produce an annual Report Card consolidating vast amounts of quantitative information already available in agency databases. Congress and the interested public would be able to see at a glance whether the number of rules affecting small businesses and localities is going up or going down, whether any significant deregulation is occurring, the minimum cost of recently adopted major rules, and whether regulatory activity at the top rulemaking agencies is primarily driven by statute or agency initiative.

- ***Create New Categories of Major Rules.*** OMB (or Congress) should require the use of new rankings or categories (Category 1, 2, 3, etc.) in official publications to better convey the full costs of the major or economically significant rules that agencies propose or adopt.

- ***Make the Rule Reform Nominations Process More Transparent.*** There currently exists no up-to-date information clearinghouse on what actions, if any, agencies are taking on public nominations of rules to be reviewed and modified or rescinded. The lack of timely information discourages the public from submitting nominations and following up on agency performance. OMB should post all nominations it receives on its Web site, and provide timely status reports about them. Further, OMB should post any items slated for OIRA or agency review in the Unified Agenda, with a hyperlink to the OMB Web site list.

- ***Extend OMB Review to Independent Agency Rulemakings.*** Several statutes—the Paperwork Reduction Act, the Information Quality Act, the Regulatory Flexibility Act, and the Regulatory Right to Know Act—create regular opportunities for OMB to review and offer comment on independent agencies' regulatory activities. Independent agencies would be under no legal obligation to heed OMB's views, but they would risk public disapprobation for ignoring good advice, failing to address reasonable criticism, or refusing to correct significant errors.

- ***SBREFA: Clarify Key Terms and Compensate Winning Plaintiffs.*** To prevent agencies from evading the duty to perform regulatory flexibility analyses, Congress should authorize SBA's Office of Advocacy to define "significant impact on a substantial number of small entities" via a notice-and-comment rulemaking. To level the legal playing field between agencies and the small entities they regulate, Congress should authorize winning small business plaintiffs

to collect compensation for damages and full reimbursement for all reasonable attorneys fees. Additionally, Congress should overturn the Supreme Court's *Buckhannon* decision so that small business plaintiffs once again qualify as prevailing and, thus, entitled to recover legal expenses if they prompt an agency to change its conduct or policy, whether or not the change is ordered by a court.

- ***Codify E.O. 13272.*** Congress should amend the RFA to codify E.O. 13272. This would ensure that agencies continue to give appropriate consideration to Advocacy's comments and address the comments in final rules after President Bush leaves office. The amended statute should also require independent agencies to work with Advocacy to develop more flexible, less costly rules affecting small business.

- ***Strengthen Section 610 of the RFA.*** Congress should amend Section 610 to require agency review of all existing small business regulations, not just those deemed to have a "significant impact on a substantial number of small entities." Each agency should also have to submit to Congress, OIRA, and the Office of Advocacy an annual report on its Section 610 review program

- ***UMRA: Shrink Regulatory Impact Assessment Loophole.*** UMRA allows agencies to avoid performing an RIA for major intergovernmental mandates if the rule's requirements specifically set forth in law. This loophole should be closed. The public has a right to know how much it will be paying whether the rule is discretionary or statutorily prescribed.

- ***Create a Competitive Market for Regulatory Analysis.*** Agencies enjoy an exclusive right to score the impacts of their regulatory proposals. This creates a classic conflict of interest, because agencies have an obvious incentive to skew cost and benefit estimates to justify their predetermined preferences and agendas. Congress should require OMB to hold a contest to determine which analysis of each major regulatory proposal is best, reviewing the rulemaking agency's analysis plus those submitted by experts in industry, state agencies, and the non-profit sector. For balance, Congress should also require GAO to provide its own independent judgment as to which analysis is best. Agencies will have to earn their credibility as regulatory experts.

- ***Extend UMRA Protections to the Private Sector.*** Just as any member of Congress can now force the House or Senate to debate and vote on whether to consider measures that would cost lower-level governments $50 million or more, so members should have the option to force Congress to debate and vote on whether to consider legislation containing $50 million mandates on the private sector, or $25 million mandates on small business.

- ***Require separate votes on large unfunded mandates.*** The House and Senate should have to cast separate votes on unfunded mandates imposing $50 million or more in annual costs on state and local governments or the private sector, or $25

million in annual costs on small business, before voting on the underlying legislation.

- ***Establish a Congressional Regulatory Office*.** OMB is a watchdog in constant peril of becoming a rubber stamp, because the OMB director and the heads of various rulemaking agencies work for the same administration and serve at the pleasure of the president. To participate effectively in regulatory decisions, and effectively check both OMB and the agencies, Congress needs an independent analytic arm—a regulatory counterpart to CBO.

- ***Require Congressional Approval before New Rules Are Effective*.** Congress will have much greater motivation to consider economic impacts when drafting regulatory statutes, and to insist that agencies consider low-cost and non-regulatory alternatives, if it has to approve final agencies rules before they can take effect. Regulations are implicit taxes that have the force of law. To most Americans, it is obvious that nobody except their elected representatives should have the power to make laws or raise taxes. Policymakers should end the current system of regulation without representation and replace it with a system of regulatory accountability.

- ***Establish a Bipartisan Regulatory Reduction Commission.*** To reduce the mass of existing federal rules, Congress should appoint a bipartisan Regulatory Reduction Commission. The Commission would review agency regulations; invite OMB, GAO, and the interested public to submit recommendations; hold hearings; and assemble a yearly package of proposed regulatory reductions. The package would be subject to an all-or-nothing vote, with no amendments allowed. Congress would send any package it approved to the president for his signature.

- ***Conduct Pilot Projects to Test the Feasibility and Desirability of Establishing Regulatory Budgets***. The ultimate goal of regulatory reform is to make agencies act more like households. However devoted to the health and safety of their members, households face inexorable tradeoffs in the use of their resources and, consequently, have strong incentives to set priorities and economize. What is most critically lacking in the regulatory arena is a budget process enabling elected officials to make explicit choices about the size of regulatory burden relative to the economy, and about the allocation of scarce resources among the myriad of regulatory objectives. Ideally, regulatory costs should be capped just like taxes and spending. However, no country has implemented this approach, and its feasibility is uncertain. Congress should authorize OMB to conduct pilot projects to explore the estimation, tracking, and enforcement issues policymakers would need to resolve before setting statutory limits on regulatory costs.

[1] Office of Information and Regulatory Affairs (OIRA), *Draft 2005 Report to Congress on the Cost and Benefits of Federal Regulation*, p. 3.
[2] *Draft 2005 Report*, p. 9.
[3] Lawrence Gasman, *Who Killed Telecom? Why the Official Story Is Wrong*, Cato Institute Policy Analysis No. 533, February 7, 2005.
[4] Stephen Pociask, *The Effects of Bargain Wholesale Prices on Local Telephone Competition: Does Helping Competitors Help Consumers?* New Millenium Council & Competitive Enterprise Institute, June 2003, http://www.cei.org/pdf/3529.pdf; Adam Thierer and Clyde Wayne Crews, Jr., *What's Yours Is Mine: Open Access and the Rise of Infrastructure Socialism* (Washington, D.C.: Cato Institute, 2003).
[5] Clyde Wayne Crews, Jr., *Ten Thousand Commandments: An Annual Snapshot of the Federal Regulatory State*, Competitive Enterprise Institute, 2005 Edition, p. 11.
[6] *Ten Thousand Commandments*, p. 12.
[7] *Ten Thousand Commandments*, p. 8.
[8] Statement of James L. Gattuso, Research Fellow in Regulatory Policy, The Heritage Foundation, House Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs, November 17, 2004, p. 4, http://www.heritage.org/Research/Regulation/tst111604a.cfm.
[9] David Schoenbrod, *Power without Responsibility: How Congress Abuses the People through Delegation* (New Haven: Yale University Press, 1993).
[10] This proposition is itself an inference from the more fundamental principle that "all men are created equal," i.e., all claims to membership in a divinely appointed ruling class or a naturally selected master race are false.
[11] *The Federalist*, No. 48.
[12] Statement of John D. Graham, Administrator, OIRA, House Government Reform Committee, July 22, 2003, pp. 8-9, http://reform.house.gov/UploadedFiles/OMB%20-%20Graham%20Testimony.pdf.
[13] Linda D. Koontz, Director, Information Management Systems, Government Accountability Office, Letter to the Honorable Candice S. Miller and the Honorable Stephen F. Lynch, July 19, 2005, p. 3, http://www.gao.gov/new.items/d05909r.pdf.
[14] Koontz, p. 4.
[15] 64 FR 46043 (August 23, 1999).
[16] Statement of David Holm, President, Association of State and Interstate Water Pollution Control Administrators, before the Senate Environment and Public Works Subcommittee on Fisheries, Wildlife, and Water, March 1, 2000, http://epw.senate.gov/107th/hol_0301.htm.
[17] GAO, *Regulatory Flexibility Act: Implementation in EPA Program Offices and Proposed Lead Rule*, GAO/GGD-00-193, September 2000.
[18] OMB, *Report to Congress*, 1997, Chapter I, pp. 6-11; Rogelio Garcia, *Federal Regulatory Reform: An Overview*, Congressional Research Service, May 22, 2001, pp. 6-8; James E. Anderson, "The struggle to reform regulatory procedures, 1978-1998," *Policy Studies Journal*, Vol. 26, 1998, pp. 1-6.
[19] GAO, *Economic Performance: Highlights of a Workshop on Economic Performance Measures*, GAO-05-796SP, July 2005, p. 4.
[20] Statement of Richard B. Belzer, Ph.D., before the Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs of the Committee on Government Reform, February 25, 2004, p. 6, http://reform.house.gov/EPNRRA/Hearings/EventSingle.aspx?EventID=785 (hereafter cited as Belzer, 2004).
[21] Robert H. Hahn and Erin M. Layburn, *Can Government Reporting Help Bring Rationality to Regulation? AEI-Brookings Joint Center for Regulatory Studies*, July 2003, pp. 11-12, http://www.aei-brookings.org/admin/authorpdfs/page.php?id=281.
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[24] Executive Order 12866, *Regulatory Planning and Review*, September 30, 1993, http://www.archives.gov/federal_register/executive_orders/pdf/12866.pdf.

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[25] Regulatory Flexibility Act of 1980, as amended, http://www.sba.gov/advo/laws/regflex.html.
[26] Statement of William Kovacs, Vice President, U.S. Chamber of Commerce, before the House Government Reform Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs, November 17, 2004, p. 3, http://reform.house.gov/UploadedFiles/Kovacs_testimony1117.pdf.
[27] GAO, *Economic Performance*, p. 4.
[28] Statement of John D. Graham, Administrator, OIRA, before the House Government Reform Subcommittee on Regulatory Affairs, November 17, 2004, http://reform.house.gov/UploadedFiles/Graham_Testimony11_17jdg3.pdf.
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[34] Belzer, 2004, pp. 13-14.
[35] Belzer, 2004, p. 13.
[36] Belzer, 2004, p. 14.
[37] Belzer, 2004, pp. 13-14.
[38] Wayne Crews identified 22 completed economically significant actions in preparing the 2004 edition of *Ten Thousand Commandments*.
[39] Plato, *Republic*, 435c.
[40] *The Federalist*, No. 72.