Before the

Office of Management and Budget

Washington, D.C. 20503

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In the Matter of	)	
	)	
Request for Comments: Government-Wide Reform	)	Docket ID No. OMB_FRDOC_0001-0201
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Comments of FreedomWorks Foundation

FreedomWorks Foundation is a 501(c)(3) nonprofit and educational foundation dedicated to building, educating, and mobilizing the largest network of activists advocating the principles of smaller government, lower taxes, free markets, personal liberty, and rule of law. In doing so, FreedomWorks Foundation acts as a "service center" for the millions of citizen-leaders who make a difference in the fight for lower taxes, less government, and more freedom.

FreedomWorks Foundation appreciates the opportunity to provide suggestions to the Office of Management and Budget (OMB) in response to the Request for Comments on the Government-Wide Reform Plan.

One of the core projects of FreedomWorks Foundation is the Regulatory Action Center. The Regulatory Action Center is dedicated to educating Americans about the impact of government regulation on economic prosperity and individual liberty. FreedomWorks Foundation is committed to lowering the barrier between millions of FreedomWorks citizen activists and the rule-making process of government bureaus to which they are entitled to contribute.

In line with this core project of the FreedomWorks Foundation, these suggestions will focus on reforms that will both reduce unnecessary burdens imposed by federal regulation on economic and personal liberty as well increase the ability of citizens to engage in the regulatory process—with the latter criterion clearly reflecting the expectations of Congress set out in Federal Register Act of 1935 and the Administrative Procedure Act of 1946.[1]

FreedomWorks Foundation suggests three core reforms to the federal regulatory process, applicable to all federal departments, agencies, and other offices that promulgate and enforce regulations. These reforms are:

- Sunset/review provisions for all new rules (excluding rule-changes reducing regulation)
- Time-limits on all applications for regulatory permissions and waivers
- Cost-benefit analysis reform to expand requirements to independent regulatory agencies and enhance the role of judicial review

Sunset/Review Provisions

All new regulations should contain legal mechanisms that automatically sunset or wind-down the rule after a given period and/or re-open the rule for review and public comment. This change is justified by the current size and scope of the Code of Federal Regulations (CFR) as well as the current phenomenon of "midnight regulations." This policy should only apply to

[1] See pages 5-6, Carey, Maeve P., *The Federal Rulemaking Process: An Overview*, Congressional Research Service, June 17, 2013

rulemaking procedures that impose new restrictions, not changes that grant regulatory relief or any other proceeding normally exempt from the standard notice-and-comment process.

The CFR is currently over 175,000 pages long.[2] The CFR is broken down into 50 different titles governing virtually every conceivable category of economic, governmental, and other human activity.[3] These countless rules represent decades of successive rule-making dating back to the dawn of the modern regulatory era in the 1930s and even beyond. Given this breadth in terms of content and time, it is hard to imagine the CFR is not riddled with rules that are outdated, redundant, contradictory, or all of the above.

These rules may be subjectively irrelevant; however the force of law in our republic is objective, meaning these accumulated rules will continue to burden American families and businesses until they are repealed or revised. The regulatory burden is not insignificant. Recent estimates put the cost to our economy of complying with federal regulations at $1.9 trillion annually.[4] To put this figure in perspective, according to World Bank data, if the annual burden of federal regulations to the American economy were a national economy itself it would be the 8th largest in the world, rivaling India.[5] The cost of regulations exceeds the gross domestic products of such nations as Italy, Brazil, Canada, South Korea, Russia, Australia, and so on.[6]

The task of culling this regulatory over-growth is daunting enough, but it would be irresponsible to proceed ahead without mechanisms to combat this staggering accumulation.

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[2] George Washington University Regulatory Studies Center, accessed at https://regulatorystudies.columbian.gwu.edu/reg-stats

[3] 2016 Code of Federal Regulations, accessed via the Government Printing Office at https://www.gpo.gov/fdsys/browse/collectionCfr.action?selectedYearFrom=2016

[4] Crews, Clyde Wayne, *Ten Thousand Commandments: 2017 Edition*, Competitive Enterprise Institute, May 31, 2017. https://cei.org/10KC/Chapter-1

[5] World Bank, Gross domestic product 2015, accessed at http://databank.worldbank.org/data/download/GDP.pdf

[6] *Ibid.*

Mandating sunset or review provisions as a part of all new regulations would assure that each regulation is regularly reexamined in the light of new facts and circumstances. Further, outmoded and superfluous rules will no longer accumulate dust and contribute to the regulatory burden that is the complexity of the CFR itself.

Additionally, sunset and review provisions would curb the problem of "midnight" rulemaking. This phenomenon occurs when an outgoing administration accelerates the promulgation and finalization of rules prior to a new administration taking office. The natural incentives here suggest that these are rules carrying little public support and likely in conflict with the agenda of the incoming administration just chosen by voters. Rules are thus rushed to finalization, protecting them by forcing the next administration to go through a formal rule-making process rather than just pulling the proposal. In short, midnight rulemaking subverts public influence and is rushed. This clearly breaches Congress's intent for the rulemaking process as set out in the Administrative Procedures Act.[7] The House of Representatives even passed the Midnight Rules Relief Act earlier this year.[8] By preventing rules from living on in perpetuity without scrutiny, outgoing administrators at all the various agencies will face a reduced incentive to ram through unpopular and ill-considered rules.

Time Limits

All requests made to federal agencies to consider permits or waivers in accordance with existing regulations should be subject to strict time limits. If a lawful application for a permit or

[7] Carey
[8] 115th Congress, H.R. 21- Midnight Rules Relief Act of 2017, accessed at https://www.congress.gov/bill/115th-congress/house-bill/21

waiver is not decided within a reasonable but fixed time frame, then the application should be deemed approved.

The Sixth Amendment to the Constitution guarantees the right to a "speedy" trial to accused criminals. Yet, innocent people and their businesses enjoy no such expectation of expediency when it comes to their proceedings with federal regulatory agencies. Unfortunately, this fact was regularly exploited by the previous administration to *de-facto* achieve regulatory policy objectives outside of the formal rulemaking process.

The Obama administration consistently delayed judgements on regulatory permits and waivers as a way of achieving larger policy objectives. The most notorious case is of course that of the Keystone XL Pipeline, when the TransCanada Corporation waited three and half years for a decision from the State Department, with the permit ultimately being denied.[9] While FreedomWorks Foundation commends President Trump for reversing this decision, Keystone XL was but the tip of the iceberg in terms of the Obama administration's regulatory obfuscation and obstruction.

Over the last decade America has experienced an energy renaissance as a result of booming domestic oil and natural gas production. Yet at the same time, production of oil and gas in areas under federal control fell in real terms despite the fact that these areas account for nearly a quarter of all the nation's proven reserves.[10] From 2010, when production of both oil and natural gas in non-federal areas began to surge, oil production in federal areas fell from 1.94

[9] Record of Decision and National Interest Determination, Department of State, accessed at https://keystonepipeline-xl.state.gov/documents/organization/269323.pdf

[10] Humphries, Marc, *U.S. Crude Oil and Natural Gas Production in Federal and Nonfederal Areas,* Congressional Research Service, June 22, 2016

billion barrels per day to 1.81 billion by 2014, rising back to 1.96 billion in 2015.[11] Natural gas production in federal areas fell outright from 6.3 trillion cubic feet in 2010 to 4.6 trillion in 2015.[12] To put these figures in perspective, production in non-federal areas rose from 3.5 billion barrels per day to 7.5 billion for oil and 15.6 trillion cubic feet to 24.1 trillion for natural gas.[13] In short, the entirety of the energy production boom Americans have enjoyed over the last decade happened in areas not controlled by the federal government.

This is not for industry's lack of trying to exploit these valuable resources. Data on drilling permit approvals clearly show the federal government impedes production. According to the Institute for Energy Research, in 2011 it took an average of 307 days for the Bureau of Land Management to approve drilling permits. In 2006, the average was 218 days. Since this peak, wait times have improved. However, average wait times between 2005 and 2009 were 205 days compared to 237 days between 2009 and 2015. That is over a month on average at a critical time for the American energy industry.[14]

Arguably above all else, businesses seek certainty. It allows for more confident investment and hiring—and thus more of both. The global fuel market is already riddled with uncertainty. An oil or gas well that is profitable today may not be tomorrow as a result of events on the other side of the planet. There is no reason to exacerbate this situation nor does it behoove economic growth to subject any other business or industry to lengthy and indefinite dealings with the government. According to the Small Business Administration, nearly a dozen broad industry categories in the United States are subject to federal permitting including such integral industries

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[11] *Ibid.*
[12] *Ibid.*
[13] *Ibid.*
[14] *Oil Production on Federal Lands Slight Above Its FY 2010 High,* Institute for Energy Research, July 7, 2016. http://instituteforenergyresearch.org/analysis/oil-production-federal-lands-slightly-fy-2010-high/

as agriculture, transportation, and mining.[15] This represents countless direct jobs and businesses and exponentially more that rely on these industries.

Establishing fixed windows for regulatory permit and waiver decisions would improve economic growth by fostering more confidence and certainty in investment and hiring decisions that hinge on said permits and waivers. In turn, these industries would be able to more affordably and efficiently serve the other American industries and families who are their customers—amplifying the benefit of this policy change across the economy.

To ensure such a policy has teeth, any request which does not present some sort of overwhelming concern to national security or public safety should be automatically approved if a decision is not reached within the established time frame.

Cost-Benefit Reform

The rate and economic burden of regulation by themselves warrant a hard look at the cost-benefit analysis (CBA) system in federal agencies. Combined with recent activity at the Environmental Protection Agency (EPA) as well as a growing chorus in the academic literature, it is clear that a comprehensive review and overhaul of the CBA system is warranted.

First and foremost, all regulatory agencies should be required to conduct CBAs to justify, at a minimum, all economically significant regulations (those estimated to have greater than a $100 million annual impact). According to Dr. Jerry Ellig of the Mercatus Center at George Mason University:

[15] Accessed at https://www.sba.gov/starting-business/business-licenses-permits/federal-licenses-permits

> "Scholarly research has found that many independent agencies conduct even less thorough economic analysis than executive branch agencies. Independent agencies are not currently subject to the executive orders on regulatory analysis and review. Some, such as the Securities and Exchange Commission, are required by law to conduct economic analysis when determining whether their regulations are in the public interest. Others have no such requirement."[16]

It is time for this standard to be unified. Independent regulatory agencies share significant responsibility for today's regulatory complexity and economic impact. At the end of 2015, the top five[17] independent regulatory agencies in rule-making accounted for 342 rules in the pipeline, of which 12 were deemed economically significant.[18] These five further accounted for 10 percent of the total rules in the pipeline.[19]

The case for patching this glaring hole enjoys both economic and legal support. FreedomWorks Foundation shares this contention with Office of Information and Regulatory Affairs Administrator (OIRA)-nominee Neomi Rao. Rao, writing for the *Yale Journal on Regulation*'s *Notice and Comment Blog* summarizes and defends a recent report from the American Bar Association addressing this topic:

> "The Report reflects widespread agreement about certain realities of 'independent' agencies. First, the Supreme Court has consistently recognized that such agencies are part of the Executive Branch...Second, the Executive Branch has consistently taken the position that the

[16]Testimony before the Senate Committee on Homeland Security and Governmental Affairs Hearing on "Toward a 21st-Century Regulatory System"; Ellig, Jerry, "Comprehensive Regulatory Impact Analysis: The Cornerstone of Regulatory Reform," The Mercatus Center at George Mason University, February 25, 2015. https://www.mercatus.org/system/files/Ellig-SenateHSGACommittee-Testimony.pdf
[17] Federal Communications Commission, Securities and Exchange Commission, Nuclear Regulatory Commission, Consumer Product Safety Commission, and Federal Acquisition Regulation
[18] Crews
[19]*Ibid.*

> independent commissions can lawfully be subject to regulatory review."[20]

In addition to expanding CBA accountability, CBA oversight requires review and reform. This is emphasized by recent issues with CBAs at EPA and growing academic literature.

The EPA is by all accounts one of the most aggressive and expensive regulatory agencies in the modern American government. However, despite being an executive regulatory agency subject to CBA requirements, the EPA has increasingly come under scrutiny for deceitful tactics in generating CBAs to defend some of its most expensive rules.

Of particular egregiousness is the saga detailed in a 2014 Senate Committee on Environment and Public Works report on EPA's formulation of CBAs to justify most all new regulations under the Clean Air Act over the past two decades, including 32 economically significant rules imposing billions of dollars in new regulatory costs. The report itself is exhaustive and details a bizarre and frightening level of corruption at EPA, concluding:

> "It is now clear that [John] Beale, a convicted con artist, was a central player in one of EPA's most significant ruelmakings, the 1997 [National Ambient Air Quality Standards] for Ozone and Particulate Matter (PM). This effort codified EPA's now customary practice of using fine particulates [PM] to inflate the benefits of nearly all regulations issued under the Clean Air Act. Yet the science supporting nearly all of EPA's alleged benefits remain hidden and unverified. Moreover, Beale… introduced a series of actions that collectively comprise what this report refers to as "EPA's Playbook" for pushing through controversial rulemakings. These actions include a heavy handed managing of the interagency review process in a way that compresses timelines through

[20] Rao, Neomi, "Regulatory Review for Independent Agencies," *Yale Journal on Regulation Notice and Comment,* December 14, 2016. http://yalejreg.com/nc/regulatory-review-for-independent-agencies-by-neomi-rao/

> sue-and settle agreements and deprives other stakeholders of the necessary time to conduct meaningful analysis; it is an outcome driven strategy, not one based in science; and whose end justify whatever means are necessary to push through EPA staffs' desired outcome."[21]

EPA again serves as a case study on the limitations and abuse of the current regulatory CBA structure in a 2014 *University of Chicago Law Review* article entitled "Cost-Benefit Analysis and Agency Independence." In this piece, University of Virginia School of Law professor Michael A. Livermore challenges the conventional wisdom that CBA requirements currently over-constrain agencies, concluding:

> "It has been agencies, not OIRA, that have taken the primary responsibility for developing the methodology of cost-benefit analysis and applying it to their particular regulatory contexts. As a consequence, agencies have many important pathways to affect not only the outcomes of particular rule makings, but also the basic principles and practices for count costs and benefits. And, indeed, they have taken advantage of those pathways: EPA, the focus of this article, has affected how OIRA conducts its review and other agencies conduct their analysis."[22]

Livermore also makes clear that in many respects, OIRA is out-gunned in dealing with regulatory review. In terms of sheer resources versus quantity of regulations to review, OIRA faces an arguably impossible task. A report from the Institute for Policy Integrity at the New York University School of Law gathered recommendations for the Trump administration from former OIRA administrators. Recommending expanding OIRA, the report states, "Since its creation in 1981, OIRA's staff levels have been cut nearly in half even as its responsibilities

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[21]Bolar, Luke and Cheyenne Steel, "EPA's Playbook Unveiled: A Story of Fraud, Deceit, and Secret Science," United States Senate Committee on Environment and Public Works, March 19, 2014

[22] Livermore, Michael A., "Cost-Benefit Analysis and Agency Independence," *University of Chicago Law Review*, 81 U. Chi. L. Rev. 609 2014

continue to expand."[23] While FreedomWorks Foundation supports this particular recommendation as well, checks and balances in the CBA process should be further expanded.

All records, including detailed data and methodology, relating to agency CBAs should be made part of the public record of any regulation requiring a CBA and subsequently subject to judicial review.

As a co-equal branch of government in the Constitutional system of checks and balances, the judiciary holds a natural place in regulatory review and reform in regards to CBAs. Recent academic literature supports this contention. Caroline Cecot and W. Kip Viscusi, scholars at Vanderbilt University, wrote in 2014:

> "The performance of the courts has been sufficiently competent that entrusting greater responsibility to courts may be beneficial. There is no evidence of courts overstepping their proper scope of authority in this area.
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> As agencies rely more on [CBA] in their decision making, judicial review of [CBA] will be increasingly important. The legitimate institutional actors with respect to regulatory policies include the judiciary as well as Congress and the executive branch. To the extent that the [CBA] is the pivotal summary of the merits of these policies, engaging with regulatory policy also necessitates some engagement with [CBA]."[24]

[23]"Strengthening Regulatory Review: Recommendations for the Trump Administration from Former OIRA Leaders," Institute for Policy Integrity, November 2016.http://www.thecre.com/oira/wp-content/uploads/2016/11/Report.pdf

[24]Cecot, Caroline and W. Kip Viscusi, "Judicial Review of Agency Benefit-Cost Analysis," *Administration Unbound? Delegation, Deference, and Discretion*, George Mason University, September 12, 2014. http://masonlec.org/site/rte_uploads/files/Manne/Readings/Administraiton%20Unbound/Cecot%20%26%20Viscusi_Second%20Round.pdf

More recently, Jonathan S. Masur and Eric A. Posner of the University of Chicago Law School argue for an increased role of the judiciary in CBAs by highlighting two cases that are commonly cited as examples of judicial *overreach.* Of note, in both of these cases the courts found, "[t]he regulator's cost-benefit analyses were defective, seriously so."[25] Masur and Posner conclude:

> "[*Corrosion Proof Fittings v.* EPA] and [*Business Roundtable v. SEC*] have long been criticized as egregious examples of judicial overreaching into areas of agency discretion. But the courts should be celebrated for their insight rather than condemned for their hubris. As the Supreme Court has gradually come to recognize, regulatory agencies should use CBA and courts are capable of forcing them to. CBA is a decision *procedure*: requiring agencies to comply with this procedure is no more difficult than forcing them to comply with the procedural elements of the [Administrative Procedures Act]. And while CBA also requires substantive judgments—estimates of valuations—that are more difficult for courts to review, courts can nonetheless contribute to administrative rationality by correcting valuation errors that regulatory agencies frequently commit and demanding that agencies offer explanations for their valuations that go beyond boilerplate."[26]

The record and literature clearly reflect a systemic failure of the CBA process throughout the regulatory state. This structural failure allows for agencies to produce deceitful CBAs justifying regulatory agendas versus regulatory agendas shaped by proper CBAs. Further, some major regulatory agencies are exempt from the CBA process altogether. Therefore, FreedomWorks Foundation strongly recommends that CBA requirements expand to all rule-

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[25]Masur, Jonathan S. and Eric A. Posner, "Cost-Benefit Analysis and the Judicial Role," *Coase-Sandor Working Paper Series in Law and Economics*, 787. February 7, 2017. http://chicagounbound.uchicago.edu/law_and_economics/787

[26]*Ibid.*

making agencies and all records related to CBAs be made public to foster independent and, subsequently, judicial review.

Conclusion

Again, FreedomWorks Foundation appreciates the opportunity to make these constructive suggestions on behalf of our millions of citizen activists nationwide. These three core reforms to the regulatory system will go a long way in reversing the trend of ever-growing rules and begin to ease the constraint of an unwieldy Code of Federal Regulations on our nation's economy, helping countless families and businesses through increased job creation and investment.

Thank you for your time and consideration,

Adam Brandon
President,

Ken Cuccinelli, II
Director and General Counsel,

&

Patrick Hedger
Foundation Program Manager,
FreedomWorks Foundation

400 N. Capitol Street NW
Suite 765
Washington, DC, 20001