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TIME FOR A MORATORIUM ON NEW REGULATIONS

INTRODUCTION

In an effort to ease the burden of federal red tape, Representatives Tom DeLay (R-TX) and David McIntosh (R-IN) and Senators Don Nickles (R-OK), Christopher Bond (R-MO), and Kay Bailey Hutchison (R-TX) have introduced legislation (H.R. 450/S. 219) to place a moratorium on executive branch regulatory activities. The purpose of the bills is to provide for a "time-out" period, during which the Congress and the Administration can debate and study the large number of regulations currently being written and consider pending reforms aimed at improving the way in which rules are written.

Congress is right to be concerned about the heavy burden of regulation on the economy. The departing Bush Administration estimated in 1993 that regulation cost the economy $542 billion in 1991 and that the cost would increase to $662 billion by the year 2000.[1] Using different calculations less than a year later, the Clinton Administration placed the cost of federal regulation to the economy at the still very high figure of "at least $430 billion annually."[2] Despite these figures, the Administration's November regulatory agenda indicates plans to issue 872 final rules in the upcoming months.[3] Private sector analysis of just two of eight proposed rulemakings from one agency, the Occupational Safety and Health Administration (OSHA), estimates these rules would cost business billions of dollars annually to implement.[4]

1 Office of Management and Budget, "Regulatory Reform and Program for 1993," in *Budget Baselines, Historical Data, and Alternatives for the Future*, U.S. Government Printing Office, January 1993, p. 111.

2 Vice President Al Gore, *From Red Tape to Results: Creating a Government that Works Better and Costs Less, Report of the National Performance Review*, September 7, 1993, p. 32.

3 U.S. Senate Republican Policy Committee, "Regulations Balloon Under Clinton," *Regulation Watch*, January 6, 1995. The Administration's regulatory plan covers the period October 1994-April 1995.

4 The eight rulemakings are listed in the Department of Labor's regulatory agenda "because of their significant impact on the economy or other government agencies." See "The Department of Labor 1994 Regulatory Plan," in *The Regulatory Plan*

Before introducing the legislation, the Republican leadership first asked the President in a letter to declare a 100-day moratorium himself. The Administration refused, calling the freeze a "blunderbuss that could work in unintended ways."[5] A moratorium, however, would not stop rules that would ease unnecessary federal red tape or address imminent threats to public safety. The moratorium legislation is designed instead to provide both the Administration and the Congress with two important opportunities:

- ☞ Congressional committees and the Administration will gain a review period to examine rules that are in the pipeline and the chance to determine whether the Administration's own regulatory review processes are working.
- ☞ Congress will have an opportunity during the moratorium period to debate the regulatory process reforms included in such measures as the House Republicans' Contract With America, including risk assessment and cost-benefit reform, paperwork reduction, a regulatory budget proposal, and private property rights reform.

HOW THE PROPOSED MORATORIUM WOULD WORK

The Regulatory Transition Act of 1995 would halt agency rulemaking dating back to November 9, 1994, and extending until June 30, 1995. Rulemaking activities that would be covered by the moratorium thirty days after the bill's enactment include substantive or interpretative rules, statements of agency policy, notices of inquiry, and advance notices and regulatory notices of proposed rulemakings.

The moratorium also would include regulatory actions covered by statutory and court deadlines. Any deadline would be extended for five months or until July 1, 1995, whichever is later. So the public would know what rulemakings and deadlines would be covered by the moratorium, the President would be required within thirty days to publish the list in the *Federal Register*.

The purpose of the legislation, however, is to suspend only burdensome regulations. Thus, it exempts from the moratorium those rules that would streamline or reduce regulatory or administrative actions and license and registration approvals. It is no "blunderbuss." Despite Administration officials' claims, it is not intended, for example, to block the Administration's proposals to streamline federal procurement rules.[6] The legislation also would allow the President, through executive order, to waive the moratorium for actions necessary because of imminent threats to public health and safety.

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and the Unified Agenda of Federal Regulations, Vol. I, Regulatory Information Service Center, October 1994, pp. 57128-57146. (Despite the October date, the information was reprinted from the *Federal Register* of November 14, 1994.)

5 Bureau of National Affairs, *Daily Report for Executives*, "House GOP Urges Regulatory Freeze; White House Officially Rejects Idea," December 15, 1994.

6 *White House Bulletin*, January 17, 1995, p. 3. In this article, the *Bulletin* cites remarks by an Administration official stating that the "moratorium would hold up the positive reforms to Federal procurement policy" supported by the Administration and others.

THE REGULATIONS THAT WOULD BE COVERED

A principal stimulus for the regulatory moratorium is the large number and wide scope of federal regulatory actions now under way. The moratorium would allow these regulations to be examined, while lawmakers at the same time could streamline and improve the regulatory process itself. The actions listed below, which have been estimated to cost close to $50 billion, are only a sample of the pending rulemaking actions that would be covered under the moratorium:

Indoor Air Quality. The Occupational Safety and Health Administration (OSHA) would be prevented from promulgating a rule to require restaurants, retailers, office building owners, and others to implement comprehensive indoor air and ventilation plans. The rule would require these businesses, as well as manufacturers, to ban cigarette smoking unless smoking takes place in separately ventilated rooms. OSHA estimates that the rule would cost employers $8.1 billion annually.[7]

Ergonomics (Also Called Repetitive Motion Disease). OSHA currently is working on a rule that would require employers to take a number of actions to address repetitive motion injuries. These are injuries due to repeated hand, wrist, or other physical motions that cause or aggravate musculoskeletal disorders. Employers would be required not only to have written plans to prevent these injuries, but also to take actions to redesign work areas, such as desks and computer set-ups, to slow assembly lines, and potentially to pay for medical bills. Private industry estimates that a similar rule proposed by California-OSHA would cost $3.1 billion annually in that state alone. Other sources estimate the federal rule would cost $21 billion to implement.[8]

Race and Gender Disclosure Rules. The Federal Reserve Board would be prevented from issuing final rules under the Community Reinvestment Act. Specifically, the moratorium would stop work on a requirement that banks and thrifts report race and gender data of small businesses and farmers seeking loans for $1 million or less. This proposal, incidentally, contradicts another Federal Reserve rule that prohibits institutions from collecting such data on loan applications.[9]

Labeling of Sunglasses. The Food and Drug Administration (FDA) would be stopped from any further work on a rule to require labeling of sunglasses. According to the Administration's regulatory agenda, the purpose of this proposal (which is still in the pre-rule stage) is to make sure consumers are aware that overexposure to ultraviolet radiation could hurt their eyes.[10]

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7 OSHA proposed rule on indoor air quality, *Federal Register*, April 5, 1994, pp. 15968-16039.

8 For information on the proposed rulemaking, see "The Department of Labor 1994 Regulatory Plan," pp. 57141-57142. For cost information, see "Regulations Balloon Under Clinton," cited above. See also Jeff Nesbit, "OSHA and Ergonomics: Business as Usual?," *The Washington Times*, November 25, 1994, p. B7.

9 Bureau of National Affairs, *Daily Report for Executives*, "Bankers Oppose Race/Gender Disclosure and Enforcement Sanctions Under CRA Plan," November 25, 1994.

10 "The Department of Health and Human Services Semiannual Regulatory Agenda," *The Regulatory Plan*, Vol. I., p. 57563.

Paper Industry "Cluster Rules." The Environmental Protection Agency (EPA) has proposed what it terms "cluster rules" for the paper industry. Basically, these rules combine requirements under the Clean Air and Clean Water Acts. While the EPA claims the new rules would simplify existing regulations, many businesses say they actually complicate them. According to the paper industry, the rules would cost $11 billion in capital expenditures. According to the *Richmond Times-Dispatch*, the EPA admits "the new rules would force 33 mills to close; 21,000 people would lose their jobs."[11]

Great Lakes Water Quality Initiative. The EPA's Great Lakes Initiative would impose uniform standards for water quality on eight different states in the Midwest (Illinois, Indiana, Michigan, Minnesota, New York, Ohio, Pennsylvania, and Wisconsin). The EPA first proposed the initiative on April 16, 1993, and is required by court order to issue the rules on March 13, 1995. The EPA estimates that the proposal could cost from $80 million to $500 million annually. But in a study conducted for the Council of Great Lakes Governors, DRI-McGraw Hill estimated that it would cost over $2 billion per year and up to 33,000 jobs lost. According to the Great Lakes Water Quality Coalition, which consists of local governments, businesses, and agricultural interests in the region, the initiative will not "significantly improve" water quality and "does not address the predominant sources of chemical pollutants into the Great Lakes Basin—air deposition and stormwater runoff."[12]

Clean Air Act: California Federal Implementation Plan (FIP). The EPA is required by judicial deadline to issue in February its final federal plan to put three areas in California (Los Angeles, Sacramento, and Ventura) in compliance with the air quality requirements in the 1977 Clean Air Act. The 1,700-page draft plan would impose draconian limits on emissions, ranging from factories to automobiles and trucks and even to lawn mowers. The EPA estimates that the FIP could cost Californians between $4 billion and $6 billion annually.[13] According to the State of California, when the FIP is fully implemented in 2010 the "losses will total at least $8.4 billion in direct costs, $17.2 billion in output, and 165,000 jobs." This estimate does not include the impact on transportation firms in the rest of the state that are affected by the rule.[14]

RECOMMENDED ACTIONS DURING THE MORATORIUM

These proposals are only a sampling of the hundreds being worked on by federal agencies which together would impose many billions of dollars in regulatory burdens on the economy. A regulatory moratorium would allow Congress and the Administration to review the justifications for these rules to see whether they follow the standards set by the

11 Editorial, "The Cluster Rule," *Richmond Times-Dispatch*, December 6, 1994, p. A12.

12 Fact Sheet on the Great Lakes Initiative, The Great Lakes Water Quality Coalition, 200 East Randolph Drive, Suite 1108, Chicago, IL, 60601, 312/819-1111.

13 James H. Burnley IV, and Warren E. Hoemann, "The California Federal Implementation Plan (FIP): EPA's Formula for Economic Disaster," *Legal Opinion Letter*, Vol. 4, No. 17, Washington Legal Foundation, July 15, 1994.

14 California Trade and Commerce Agency, comments on the FIP proposal sent to EPA, August 31, 1994.

Administration and should be allowed to move forward. Even more important, Congress also should use the interval to work on legislation that would roll back burdensome rules and overhaul the regulatory process.

Clinton's Regulatory Review. According to President Clinton's executive order on regulatory review, the White House Office of Information and Regulatory Affairs (OIRA) and the federal agencies are supposed to weigh a number of factors when deciding to regulate. Specifically, the executive order requires that agencies planning to issue "significant rulemakings" (those estimated to cost more than $100 million annually) must analyze their costs, benefits, and possible alternatives.[15] Although not a specific requirement, agencies are encouraged when setting regulatory priorities to consider the risks posed by "various substances or activities within its jurisdiction." Agencies also are required under the order to have a process by which they can review existing regulations.

During the moratorium period, Congress and the Administration should review at least the ten or fifteen proposals expected to impose the largest burden on the economy to see whether agencies actually are following the Administration's own requirements to conduct cost-benefit analyses, consider risks, and look for less costly alternatives. The high cost of the regulations mentioned above raises questions about how closely the agencies are adhering to the executive order. In addition, Congress should review issues brought up in the Clinton Administration's own six-month review of the order. For example, although OIRA Administrator Sally Katzen stated that they had "made a very good start in implementing" it, she admitted that "the start-up time for various provisions of the Order has taken longer (and in some cases a lot longer)" than anticipated, such as agency review of existing regulations. In addition, the report listed items for further consideration, such as how agencies determine which rules are "significant" and whether the definition needs to be clarified; whether executive branch review time limitations are sufficient—especially for significant rules; and *post hoc* evaluation of rules to determine whether initial estimates were correct and the results expected achieved.[16]

OSHA's proposed rulemaking on indoor air quality is one example of a rule that would benefit from closer scrutiny. According to the Administration's six-month review, OIRA spent only nine days reviewing an $8 billion-a-year regulation.[17] Given OSHA's propensity for past regulatory excesses, this rule warrants more study. In addition, the agency's scientific justification for the rule relies heavily on a controversial EPA second-hand smoke study. Congress, last year, almost passed legislation that would have given the EPA authority to conduct further studies and to educate the public and inspectors regarding "indoor air quality" or "sick building syndrome." Although the legislation states that the EPA is supposed to coordinate with OSHA, in certain cases the two agencies' responsibilities appear to overlap.

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15 See Executive Order 12866 for the complete definition of a "significant" rule. Executive Order 12866, September 30, 1993, "Regulatory Planning and Review," *Federal Register*, October 4, 1993, p. 51735.

16 Office of Management and Budget, "Report on Executive Order No. 12866, Regulatory Planning and Review," *Federal Register*, May 10, 1994, pp. 24276-24313.

17 *Ibid.* p. 24303.

The "Contract" Regulatory Reforms. Placing a freeze on most regulatory activity also would give Congress an interval within which to consider regulatory reforms such as those included in the House Republicans' Contract With America, as well as others introduced in the Senate. The unifying purpose of these proposals is to establish a more thorough system of scrutiny for proposed regulations than exists under current law and the Clinton executive order.

The Contract With America contains major regulatory reforms which have been introduced by Representatives Bill Archer (R-TX), Tom DeLay (R-TX), Billy Tauzin (D-LA), Lamar Smith (R-TX), and others as the Job Creation and Wage Enhancement Act of 1995 (H.R. 9). The reforms include putting in place risk assessment and cost-benefit analysis procedures for regulations, a regulatory budget to control the cost of regulations, improvements in the Paperwork Reduction and Regulatory Flexibility Acts, and compensation for private property owners for government "takings" of their property. Most of these provisions were introduced in both Houses last year as separate pieces of legislation and came close to passage.

Three reforms, in particular, would dramatically improve the current regulatory process: risk assessment/cost-benefit analysis, a regulatory budget, and private property rights reform. Specifically:

- ✔ **Congress should require agencies to base rules on sound science and to prioritize.**
- ✔ **Action should be taken to stop government from restricting private property to enforce environmental regulations.** Out of simple fairness, the government should be required to reimburse property owners if a regulation restricts their right to use their land.
- ✔ **Debate over these measures, moreover, would help lay the needed groundwork for enactment of a regulatory budget.** This reform would place a ceiling on the total estimated cost that could be imposed on the economy each year by all federal regulations. The agencies must improve their ability to estimate the cost of regulations and to prioritize before a regulatory budget can work or be enacted by Congress.

CONCLUSION

Both the Clinton Administration and the new leadership in Congress have called for improving the regulatory process and easing the burden of red tape. Neither branch of government, however, has acted either to curb the volume of new rules or to lower the cost of regulations now in the pipeline. A regulatory moratorium would give both the Administration and Congress time to rethink current regulations and enact reforms to ease the impact of future rules.

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