REQUIRE EVALUATION BEFORE IMPLEMENTING EXECUTIVE WISHLISTS (REVIEW) ACT OF 2015; AND THE REGULATORY PREDICTABILITY FOR BUSINESS GROWTH ACT OF 2015

HEARING

BEFORE THE

SUBCOMMITTEE ON
REGULATORY REFORM,
COMMERCIAL AND ANTITRUST LAW

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTEENTH CONGRESS

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ON

H.R. 3438 and H.R. 2631

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CONTENTS

NOVEMBER 3, 2015

OFFICIAL HEARING RECORD

UNPRINTED MATERIAL SUBMITTED FOR THE HEARING RECORD

Material submitted for the Hearing Record by the Honorable Hank Johnson, Jr., a Representative in Congress from the State of Georgia, and Ranking Member, Subcommittee on Regulatory Reform, Commercial and Antitrust Law. These submissions are available at the Subcommittee and can also be accessed at:

http://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=104126.

Material submitted for the Hearing Record by the Honorable Tom Marino, a Representative in Congress from the State of Pennsylvania, and Chairman, Subcommittee on Regulatory Reform, Commercial and Antitrust Law. These submissions are available at the Subcommittee and can also be accessed at:

http://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=104126.

Material submitted for the Hearing Record by Paul R. Noe, Esq., Vice President for Public Policy, American Forest & Paper Association. These submissions are available at the Subcommittee and can also be accessed at:

http://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=104126.

REQUIRE EVALUATION BEFORE IMPLEMENTING EXECUTIVE WISHLISTS (REVIEW) ACT OF 2015; AND THE REGULATORY PREDICTABILITY FOR BUSINESS GROWTH ACT OF 2015

TUESDAY, NOVEMBER 3, 2015

HOUSE OF REPRESENTATIVES,

SUBCOMMITTEE ON REGULATORY REFORM,
COMMERCIAL AND ANTITRUST LAW

COMMITTEE ON THE JUDICIARY,

Washington, DC.

The Subcommittee met, pursuant to call, at 10:05 a.m., in room 2141, Rayburn House Office Building, the Honorable Tom Marino (Chairman of the Subcommittee) presiding.

Present: Representatives Marino, Goodlatte, Issa, Collins, Walters, Ratcliffe, Trott, Bishop, Johnson, DelBene, Jeffries, and Peters.

Staff Present: (Majority) Daniel Flores, Chief Counsel; Andrea Lindsey, Clerk; and (Minority) Slade Bond, Counsel.

Mr. MARINO. The Subcommittee on Regulatory Reform, Commercial and Antitrust Law will come to order. My colleagues are on their way. But I usually give at least 5 minutes. We've given 7. So we'll get started. I know your schedules are as hectic as ours.

Without objection, the Chair is authorized to declare a recess of the Committee at any time.

We welcome everyone to today's hearing on H.R. 3438, the "Require Evaluation before Implementing Executive Wishlists (REVIEW) Act of 2015," and H.R. 2631, the "Regulatory Predictability for Business Growth Act of 2015." And I now recognize myself for an opening statement.

Today, this Subcommittee continues its overall regulatory reform agenda by examining the targeted reforms to the U.S. regulatory process contained in two, straightforward bills. I'm honored that we can take a good look at H.R. 2631, the "Regulatory Predictability for Business Growth Act of 2015," a bill offered by my colleague, Congressman Steve Russell of Oklahoma.

H.R. 2631 addresses a recent Supreme Court decision that upended the process by which agencies can change its own interpretive rules. How to address this change is an important question for us to consider today.

Today this Subcommittee will also examine my bill, the REVIEW Act. Over the last decade, our Nation has faced a costly and unprecedented regulatory onslaught. During this period, the size and scope of Federal regulation has ballooned to epic proportions. Longstanding Executive Branch policies have mandated additional scrutiny for "significant regulatory action," i.e., those rules with an annual effect on the economy of $100 million or more.

But regulatory uberous has flown past these commonsense concerns as agencies more frequently propose mega-rules with annual cost in excess of $1 billion. But as these monstrous regulations become more frequent, an average of three per year during the Obama administration, and six in 2014 alone, it almost seems that nothing can curtail these potential to damage our economy. This bill is one more step in this Subcommittee's continued effort to put forth commonsense regulatory reform measures for the benefit of American workers.

The REVIEW Act presents a simple premise that massive $1 billion regulations should face full and thorough review by the courts before they become effective and force compliance costs on businesses across the country. It achieves this goal through a simple and straightforward mechanism, a mandatory stay of any $1 billion rule if it is challenged in court within 60 days of its promulgation.

Some observers might insist that the reforms in this bill are unnecessary. But just this summer, in the Supreme Court's decision in *Michigan v. EPA*, we saw firsthand that irreparable harm can occur as a result of expansive, costly, and poorly-crafted regulation.

In this case, the court found that the EPA has promulgated its Utility MACT rule through a faulty process and on legally infirm grounds because it chose not to consider costs when promulgating the rule. In this case, the costs of the rule were estimated by the EPA itself as $9.6 billion per year. In return the EPA's best estimate of potential benefits were in the range of a mere $4 million to $6 million annually.

As Justice Antonin Scalia wrote in his opinion for the court, "One would not say that is even rational, never mind appropriate, to impose billions of dollars in economic cost in return for a few dollars in health or environmental benefits." Unfortunately for workers, homeowners, and taxpayers across the country, the Utility MACT rule remained in effect as litigation took years to work itself to a final decision at the Supreme Court.

Over this time, electricity providers were forced to close power plants as they faced uncertain compliance burdens. Jobs were lost, and electricity costs to consumers rose as a result. Until recently, regulations with $1 billion annual price tags were a rare occurrence. Since 2006, however, we have seen 26 in total.

The REVIEW Act is a step in the right direction to address this growing concern. It also provides a bit of certainty to the American people that massive $1 billion regulations must pass legal muster before their costs are passed on. I thank the Chairman for joining me on this bill, and I look forward to hearing from today's esteemed panel.

[The bills, H.R. 3438 and H.R. 2631, follow:]

I

114TH CONGRESS
1ST SESSION

H. R. 3438

To amend title 5, United States Code, to postpone the effective date of high-impact rules pending judicial review.

IN THE HOUSE OF REPRESENTATIVES

AUGUST 4, 2015

Mr. MARINO (for himself and Mr. GOODLATTE) introduced the following bill; which was referred to the Committee on the Judiciary

---

A BILL

To amend title 5, United States Code, to postpone the effective date of high-impact rules pending judicial review.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Require Evaluation before Implementing Executive Wishlists Act of 2015" or as the "REVIEW Act of 2015".

SEC. 2. RELIEF PENDING REVIEW.

Section 705 of title 5, United States Code, is amended—

(1) by striking "When" and inserting the following:

"(a) IN GENERAL.—When"; and

(2) by adding at the end the following:

"(b) HIGH-IMPACT RULES.—

"(1) DEFINITIONS.—In this subsection—

"(A) the term 'Administrator' means the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget; and

"(B) the term 'high-impact rule' means any rule that the Administrator determines may impose an annual cost on the economy of not less than $1,000,000,000.

"(2) RELIEF.—

"(A) IN GENERAL.—Except as provided in subparagraph (B), an agency shall postpone the effective date of a high-impact rule of the agency pending judicial review.

"(B) FAILURE TO TIMELY SEEK JUDICIAL REVIEW.—Notwithstanding section 553(d), if no person seeks judicial review of a high-impact rule during the 60-day period beginning on the date on which the high-impact rule is published in the Federal Register, the high-impact rule

shall take effect on the date that is 60 days after the date on which the high-impact rule is published.".

○

I

114TH CONGRESS
1ST SESSION

H. R. 2631

To require notice and comment for certain interpretive rules.

IN THE HOUSE OF REPRESENTATIVES

JUNE 3, 2015

Mr. RUSSELL introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To require notice and comment for certain interpretive rules.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Regulatory Predictability for Business Growth Act of 2015".

SEC. 2. REQUIRING NOTICE AND COMMENT FOR CERTAIN INTERPRETIVE RULES.

Subchapter II of chapter 5 of title 5, United States Code, is amended—

(1) in section 551—

(A) in paragraph (13), by striking "and" at the end;

(B) in paragraph (14), by striking the period at the end and inserting a semicolon; and

(C) by adding at the end the following:

"(15) 'longstanding interpretive rule' means an interpretive rule that has been in effect for not less than 1 year; and

"(16) 'revise' means, with respect to an interpretive rule, altering or otherwise changing any provision of a longstanding interpretive rule that conflicts, or is in any way inconsistent with, any provision in a subsequently promulgated interpretive rule."; and

(2) in section 553—

(A) in subsection (b), following the flush text, in subparagraph (A), by striking "interpretative rules" and inserting "an interpretive rule of an agency, unless the interpretive rule revises a longstanding interpretive rule of the agency"; and

(B) in subsection (d)(2), by striking "interpretative rules" and inserting "an interpretive rule of an agency, unless the interpretive rule revises a longstanding interpretive rule of the agency, and".

○

Mr. MARINO. The Chair now recognizes the Ranking Member of the Subcommittee on Regulatory Reform, Commercial, and Antitrust Law, Mr. Johnson of Georgia, for his opening statement.

Mr. JOHNSON. Thank you, Mr. Chairman.

Today's hearing provides this Subcommittee with an important opportunity to consider two regulatory reform proposals that would affect divergent aspects of the rulemaking system. The first of these proposals is H.R. 2631, the "Regulatory Predictability for Business Growth Act of 2015," which would require agencies to undertake notice and comment under section 553, the Administrative Procedures Act, prior to revising interpretive rules that are older than 1 year.

An interpretive rule is any nonlegislative rule issued by an agency to clarify its views on a subject matter. These rules are usually issued in direct response to requests by regulated firms that want more clarity and transparency in a subject area. Because the rule has no binding legal effect, the parties are not bound by an agency's expression of its current rules.

Simply put, H.R. 2631 would impose immense procedural and analytical burdens on agencies seeking to provide regulatory clarity through interpretive rules. Not only would this requirement severely burden agencies' existing practice of issuing timely, interpretive rules, but it would also wreak havoc on the entire rulemaking system.

As Donald Elliott, a professor of law at Yale Law School, noted in 1992, "Imposing a notice-and-comment requirement on nonlegislative rules would literally grind the modern administrative process to a halt."

In an Amicus brief filed in *Perez v. Mortgage Bankers*, where the Supreme Court unanimously rejected a judicial doctrine requiring notice and comment for revisions to longstanding interpretive rules, a group of leading administrative law experts similarly argued that this requirement would be "burdensome, costly, and time consuming for agencies."

The second regulatory reform proposal before us today is H.R. 3438, the "Require Evaluation before Implementing Executive Wishlists Act of 2015," or otherwise known as the "REVIEW Act," which would automatically stay high-impact rules that a party challenges within 60 days of an agency's adoption of the rule. Under current law, both courts and the agency issuing a rule may stay the effective date of a rule.

While agencies have broad discretion in postponing the effective date of a rule, a court considers several factors in deciding whether to stay a rule, including whether the party is likely to succeed on the merits. Unlike current law, the REVIEW Act would require that agencies automatically delay the effective date for rules exceeding $1 billion in costs, regardless of whether the party challenging the rule has any likelihood of success on the merits, is actually harmed by the rule, or whether staying the rule would be contrary to the public interest.

This guarantees that virtually every regulated firm would challenge high-impact rules through frivolous litigation, creating further delays for these rules, which, in many cases, have already taken years to promulgate. But the bill wouldn't just apply to these

rules; rather, it would likely apply to transfer rules, which involve the transfer of funds for budgetary programs as authorized by Congress, such as transfer rules involving the Medicare program or the Federal Pell Grant program.

In closing, I look forward to our esteemed panel's testimony today, and I yield back.

Mr. MARINO. Thank you.

The Chair now recognizes the Chairman of the full Judiciary Committee, Mr. Bob Goodlatte of Virginia, for his opening statement.

Mr. GOODLATTE. Thank you, Mr. Chairman.

Today's hearing continues the Judiciary Committee's efforts to deliver urgently needed reforms of Washington's regulatory system—a system that virtually every day places new obstacles in the path of American jobs and economic growth.

We consider today two bills: Subcommittee Chairman Marino's REVIEW Act; and Representative Russell's "Regulatory Predictable for Business Growth Act." These are new bills developed in response to Supreme Court decisions issued during the Court's 2014 term.

The REVIEW Act contains a simple common-sense reform responding to a problem highlighted by the court's decision in the case of *Michigan v. EPA*. The problem is that, too often, new regulations that impose enormous costs on our society are successfully challenged in court, but are not stayed while litigation is pending.

When these regulations are ultimately overturned, but compliance with them has been required while litigation is pending, there can be no question that large amounts of precious resources have been wasted—resources that could've been spent creating jobs, investing in development, and growing America's economy for the benefit of all.

The REVIEW Act solves this problem with a simple bright-line test that says, if a new regulation imposes $1 billion or more in annual costs, it will not go into effect until after litigation challenging it is resolved. Of course, if the regulation is not challenged, it may go into effect as normal.

This is a balanced approach. And, it provides a healthy incentive for agencies to promulgate effective but lower-cost regulations that are more legally sound to begin with.

The other bill we are examining, the Regulatory Predictability for Business Growth Act, responds to the case of *Perez v. Mortgage Bankers Association*. The bill would make sure that, notwithstanding the court's decision finding a current gap in the provisions of the Administrative Procedures Act, agencies will provide notice to the public and an opportunity for comment before they change longstanding interpretive regulations.

This is only fair. Job creators must live day-to-day with the interpretations agencies espouse, and the broader public relies on agencies' good-faith adherence to sound and settled interpretations of law. Both deserve notice and a chance to comment on changes in interpretive rules before those changes are made.

These are simple but powerful reforms that will help to improve Americans' daily lives. I urge my colleagues to consider well and support these important pieces of legislation.

I look forward to hearing the testimony of our witnesses today, and yield back. Thank you, Mr. Chairman.

Mr. MARINO. Thank you, Chairman.

Mr. Conyers, the Ranking Member of the full Judiciary Committee, will be on his way shortly. And I'm going to reserve the time for his opening statement for when he gets here.

And without objection, other Members' opening statements will be made part of the record.

And I will begin by swearing in our witnesses before introducing them. If you would please stand and raise your right hand.

Do you swear that the testimony you're about to give is the truth—before this Committee—the whole truth and nothing but the truth so help you God?

Let the record reflect that all the witnesses responded in the affirmative. Please be seated.

We have a distinguished panel with us today, and I want to thank the Members for being here. Seated to my left, the first gentleman, Mr. Brady is the president and founder of Brady Homes Illinois, and the second vice chairman of the National Association of Homebuilders.

He is a second-generation homebuilder. Brady Homes Illinois is a small, single-family building and development company that since its founding by his father, William Brady, Sr., in 1962, has become one of the largest homebuilding firms in central Illinois.

Mr. Brady has served on the NAHB board of directors for more than 10 years and has also held seats on several committees and task forces, including the NAHB Federal Government Affairs Committee and the Budget and Finance Committee. Mr. Brady has been a trustee and chairman of Build-PAC, NAHB's Political Action Committee.

Outside of NAHB, Mr. Brady has worked on many boards and commissions including serving on the board of directors, on the Federal Home Loan Bank of Chicago, in the Jack Kemp Foundation. And as a member of the Bloomington Planning Commission, and the Bipartisan Policy Center Housing Commission. Mr. Brady earned his bachelor's degree in political business from Illinois Wesley University.

Welcome, sir.

Mr. BRADY. Thank you.

Mr. MARINO. Mr. Noe is the vice president for public policy at the American Forest and Paper Association, and is also testifying today on behalf of the American Wood Council. At AF&PA, he works on a wide variety of issues, including environmental regulation, regulatory reform, renewable energy, biomass carbon neutrality, chemicals and product stewardship and sustainability.

Before joining AF&PA, Mr. Noe had extensive experience in public policy issues, including as vice president of regulatory affairs at the Grocery Manufacturers Association; in private practice, and in public service as counsel to the administrator in the Office of Regulation and Regulatory Affairs Office of Management and Budget from 2001 to 2006; as well as senior counsel to the U.S. Senate Committee on Governmental Affairs under Chairman Fred Thompson—and we all extend our sincere condolences to the Thompson

family. He was truly a great man—Ted Stevens, and Bill Roth, from 1995 to 2001.

Mr. Noe earned his bachelor's degree, Phi Beta Kappa, from Williams College and is a graduate of the Georgetown University Law Center, where he was an Olin Fellow in law and economics. Welcome, sir.

Our next witness is Mr. Clark. He is a partner at the law firm of Kirkland & Ellis, LLP, and specializes in complex trial and appellate litigation. Mr. Clark has been with the firm since 1996, with the exception of 2001 to 2005, when he was appointed to serve as deputy assistant attorney general in the environment and natural resources division of the Justice Department.

During his appointment, Mr. Clark supervised the division's appellate section—it contained 50 lawyers and staff members—and Indian resources section with another 25 lawyers and staff. He has argued and won the noted *Massachusetts v. EPA* case in the D.C. circuit and is rated, and I quote, "AV preeminent," 5.0 out of 5 by Martindale-Hubbell, the highest level of professional excellence.

Prior to joining Kirkland & Ellis, Mr. Clark was a law clerk for Judge Danny J. Boggs, of the United States Court of Appeals for the Sixth Circuit. He has written and appeared extensively in public on topics in energy efficiency, clean air and water law, administrative law, and constitutional law.

Mr. Clark is an elected member of the governing counsel of the ABA administrative law section and is currently serving as co-chair of the ABA section of administrative law and regulatory practices committee on environmental and natural resources regulation.

Mr. Clark graduated with an AB in economics and Russian/Soviet history, cum laude from Harvard University, an MA in urban affairs and public policy, summa cum laude from the University of Delaware, and J.D. Magna cum laude from Georgetown University Law Center. Welcome, sir.

Our next witness, Professor Buzbee is a professor of law at Georgetown University Law Center. Prior to joining Georgetown, Professor Buzbee worked at Emory Law School where he was a professor of law, directed Emory's environmental and natural resources law program, founded and oversaw its Turner environmental law clinic, and co-directed Emory's Center on Federalism and Intersystemic Governance. That's a tough one to say, but impressive. He is also a founding member, scholar of the Center for Progressive Reform, a Washington, D.C.-based regulatory think tank.

Before becoming professor, he was a law clerk for Judge Jose A. Cabranes at the United States Court of Appeals for the Second Circuit; and attorney fellow at the Natural Resources Defense Council; and also performed environmental law, land use, and litigation work for the New York City law firm Patterson, Belknap, Webb & Tyler.

Professor Buzbee has published scholarly works, many of which have appeared in journals, books, news outlets, and blogs. He has assisted with appellate and Supreme Court environmental federalism and regulatory litigation and provided expert testimony before congressional Committees on environmental and regulatory matters.

Professor Buzbee graduated magna cum laude with his BA from Amherst College, and his J.D. From Columbia Law School. Welcome, sir.

Each of the witnesses' written statements will be entered into the record into its entirety. I ask that each witness summarize his or her testimony in 5 minutes or less, and to help you stay within the time, there is a timing light in front of you. The light will switch from green to yellow indicating that you have 1 minute to conclude your testimony. When the light turns red, it indicates that your 5 minutes have expired.

And what I also do is, you're so intent, as I am, on wanting to communicate and read and talk to us that no one pays attention to the lights. Even I am guilty of that. So I will diplomatically and politely raise the gavel, just twirl it around a little bit to get your attention, and if you are just so that intent on looking I'll just give a nice little tap and ask you to please wrap up. If you would kindly do that.

Okay, we will begin with Mr. Brady and his opening statement.

TESTIMONY OF EDWARD BRADY, PRESIDENT, BRADY HOMES ILLINOIS, TESTIFYING ON BEHALF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS

Mr. BRADY. Well, thank you Chairman Marino, Ranking Member Johnson, and Members of the Subcommittee. I'm pleased to appear before you today on behalf of the National Association of Homebuilders to discuss H.R. 3438 and H.R. 2631, both of which would help repair our broken Federal regulatory rulemaking system.

As the Chairman said, my name is Ed Brady, and I am a small homebuilder from Bloomington, IL. Perhaps it was a simpler time when my father founded our family homebuilding business in 1962, but the complexities of regulation facing our industry today makes it difficult for a small business to survive.

Regulations imposed by government, at all levels, account for 25 percent of the final price of a new single-family home. Certainly we need to protect the environment, we need to protect worker safety, but we also need to return some sensibility and sanity to the process. Unfortunately, Federal agencies under both Republican and Democratic administrations have increasingly sought to skirt the rules set up by the Administrative Procedures Act and diminish public participation in rulemaking.

The bills we will discuss today represent significant progress toward restoring the public participation. Congress intended and provided judicial protections when a rule is challenged in court. NAHB is particularly concerned about the reliance by Federal agencies on guidance rather than going through the formal rulemaking process. That is why we strongly support H.R. 2631, which would ensure that the public has input on significant changes to existing, longstanding interpretive rules.

For an example of why this bill is needed, let's look for a moment at the ongoing struggle with the EPA and the Army Corps to define the scope of waters protected under the Clean Water Act. Prior to the regulation that was finalized earlier this year, the most recent Clean Water Act regulation addressing the scope of jurisdiction was finalized in 1986.

For 29 years, the EPA and the Corps relied on several interpretive rules, despite two Supreme Court rulings that significantly limited the scope of the Clean Water Act. Those interpretive rules had the same effect and force as a regulation, but never went through the formal rulemaking process. Most troubling is that there is little judicial oversight over the use of guidance.

Before we could challenge that, this guidance acted as improper rulemaking, we would first have to seek a ruling over the very issue of whether the guidance is "final agency action," subject to the court scrutiny. The outcome of this would be very uncertain. And while we would prefer that the rulemaking process to work as Congress intended with public input, a cost-benefit analysis, and an examination of alternative options so the agency gets it right the very first time, sometimes we need to turn to the courts for relief.

The second bill before you today, H.R. 3438, provides for a stay of enforcement for high-cost regulations pending judicial review. This is a commonsense approach that would spare small businesses the significant and irretrievable cost of compliance in the event a pending rule is overturned.

While courts issue preliminary injunctions when a rule faces legal review, these injunctions are unusual and extremely difficult for businesses to obtain. Courts require businesses to show that the regulation would impose irreparable harm, but generally do not include the monetary costs associated with compliance as meeting that standard, even though small businesses have no realistic means of seeking repair from the compliance cost for the rule later thrown out by the courts.

For example, the U.S. Department of Labor has recently proposed new overtime regulations, which would make 116,000 construction workers eligible for overtime, according to our analysis. Yet these costs would not likely be considered by the courts as imposing irreparable harm. And even if challenged in court, the rule might still be allowed to go into effect. But if the rule goes into effect, it would immediately alter how small homebuilders do business.

It is simply unfair for businesses to impose the compliance cost of a new regulation while it's under judicial review. The regulatory process is failing us and we need to repair it. These bills are a good start, and I urge this Subcommittee to support them. Thank you again for the opportunity to testify today, and I'd be happy to answer any questions.

Mr. MARINO. Thank you, Mr. Brady.

[The prepared statement of Mr. Brady follows:]

Testimony of

Ed Brady

On Behalf of the
National Association of Home Builders

Before the
United States House of Representatives
Judiciary Committee
Subcommittee on Regulatory Reform, Commercial and Antitrust Law

Hearing on H.R. 3438, the "Require Evaluation before Implementing Executive Wishlists Act of 2015"; and, H.R.2631, the "Regulatory Predictability for Business Growth Act of 2015"

November 3, 2015

Chairman Marino, Ranking Member Johnson, and members of the Committee, I am pleased to appear before you today on behalf of the National Association of Home Builders (NAHB) on H.R. 3438, the *Require Evaluation before Implementing Executive Wishlists Act of 2015*, and H.R. 2631, the *Regulatory Predictability for Business Growth Act of 2015*, both of which would help repair our broken federal regulatory rulemaking system. My name is Ed Brady, and I am a home builder from Bloomington, Illinois, and NAHB's 2015 First Vice Chairman of the Board. We appreciate the invitation to appear before the committee on this important issue.

NAHB represents over 140,000 members involved in single-family and multifamily building and remodeling, as well as other aspects of residential and light commercial construction. Each year, NAHB's builder members construct approximately 80 percent of all new housing in America. To do so, they must navigate an ever-growing and increasingly complex thicket of government regulations. The total of regulations imposed by government at all levels account for 25 percent of the final price of a new single-family home.[1] This is particularly noteworthy in an industry with thin margins and acute consumer sensitivity to price fluctuation.

Administrative Procedures Act

Congress enacted the Administrative Procedures Act (APA) in 1946 to establish a set of rules to restrain and govern the action of America's unelected rule makers. According to the Attorney General's Manual on the Administrative Procedures Act, "the basic purpose of the APA is to: 1) require agencies to keep the public currently informed of their organization, procedures and rules (sec. 3); 2) provide for public participation in the rule making process (sec. 4); 3) prescribe uniform standards for the conduct of formal rule making (sec. 4 (b)) and adjudicatory proceedings (sec. 5), i.e., proceedings which are required by statute to be made on the record after opportunity for an agency hearing (secs. 7 and 8); and, 4) restate the law of judicial review (sec. 10)."[2]

Unfortunately, regulatory rulemaking agencies under both Republican and Democratic administrations have increasingly sought to diminish public participation in rulemaking. Coupled with a lack of meaningful judicial review of agency actions, this has rendered our rulemaking system broken and not at all in line with the APA.

The bills we are here to discuss today represent significant progress toward restoring the public participation Congress intended and provide an adequate judicial check on unrestrained rulemaking agencies.

Judicial Review – H.R. 3834

H.R. 3438, the *Require Evaluation before Implementing Executive Wishlists Act of 2015,* also known as the REVIEW Act, provides for a stay of enforcement pending judicial review for high-cost rules. NAHB believes that judicial review helps ensure agency actions are both consistent with the APA and its

[1] http://www.nahb.org/generic.aspx?genericContentID=161065&channelID=311
[2] Clark, Tom C., *Attorney General's Manual on the Administrative Procedure Act,* United States Department of Justice, 9

underlying statute. Postponing implementation of high-cost rules pending judicial review is a fair and balanced approach.

The business community has long advocated for "certainty" in policy making, including in the regulatory process. Nothing is more uncertain than a judicial review outcome. Yet a business must make investments to comply with a costly, new regulation as soon as the rulemaking process is finalized Even if the courts ultimately throw out a flawed rule, the damage has already been done. Small businesses like mine cannot afford to comply with all the rules that are eventually overturned.

While courts issue preliminary injunctions when a rule faces legal review, these injunctions are unusual and extremely difficult for businesses to obtain. Courts require businesses to show that the regulation would impose "irreparable harm," but generally do not include monetary costs associated with compliance as meeting that standard — even though small businesses have no realistic means of seeking repair from the compliance costs for a rule later thrown out by the courts.

NAHB believes that current case law defers too much to regulatory rulemaking agencies. Without an appropriate check from the judicial branch, rulemaking agencies have demonstrated little concern for the economic and compliance burdens placed on small businesses. Enhanced judicial review of certain agency actions would help ensure rulemaking agencies are complying with the spirit and letter of the APA.

There are currently a number of regulations that are — or will be — before the courts, including a new ozone standard. Home builders will have to comply with these rules immediately, even if the courts subsequently reverse them.

EPA's New Ozone Standards

On October 1, 2015, the EPA strengthened the National Ambient Air Quality Standards (NAAQS) for ground-level ozone to 70 parts per billion (ppb). The EPA-instituted changes may have a significant and unambiguously negative effect on small home builders, and will cost the U.S. economy more than a billion dollars.

NAHB is concerned that this change will negatively impact home builders and developers. EPA's revised standard will greatly increase the number of impacted areas throughout the country, and the additional rules and regulations that state and local governments will be required to adopt will have a direct, negative effect on NAHB members and the overall housing market. Because of the impacts that will result from any change in the standard, NAHB encouraged EPA to retain the current 75 ppb standard.

The revised ozone NAAQS will subject large segments of the home building industry to new regulations as all states with non-attainment designations develop required State Implementation Plans (SIPs). For states that have never had to contend with non-attainment designations, there will be fewer traditional industrial sectors (i.e., electric power plants or factories) upon which to rely for emissions reductions. Similarly, in areas previously designated by EPA as non-attainment, the emissions reductions attributable to traditional industrial sectors may have already been counted toward compliance with

earlier versions of the ozone NAAQS standard. In both scenarios, states will increasingly look toward non-traditional sectors, including residential land development and construction activities, to achieve EPA's more stringent ozone air quality standards.

Land use decisions are complex and highly localized – thus the long-held tradition in American governance that these decisions are almost exclusively the domain of local authorities.[3] The following examples demonstrate situations where the Clean Air Act (CAA) spurred actions that have adversely impacted the development industry and, in turn, the availability of affordable housing. The revised NAAQS will result in an increase in the number of builders and developers facing the prospect of having to comply with an assortment of new or expanded regulations that limit or effectively dictate both where and how to build.

Daytime Construction Restrictions

The Texas Natural Resources Conservation Commission (TNRCC) proposed the Construction Equipment Operating Limitations rule, which would have banned the daytime use of all diesel construction equipment 50hp or greater during the ozone season (defined as April to October).[4] Such a ban would have had an economic impact as high as $50-$70 million annually in the Dallas/Fort Worth metropolitan area and another $100-$135 million annually in the Houston/Galveston metropolitan areas. The ultimate environmental benefit of TNRCC's proposal was extremely questionable because it would have only delayed the NOx emissions rather than preventing them altogether.

While this proposal was ultimately withdrawn, it is important to note that proposed restrictions on construction activities are likely to be tied to the ozone monitoring season. As a result, any extension of the monitoring season will only magnify the fiscal impact of potential restrictions.

Second, nighttime construction, especially in residential areas, is prohibited in most areas by municipal ordinances. For example, in Seattle, most construction can only occur in residential areas between 7:00 am and 7:00 pm on weekdays and between 9:00 am and 7:00 pm on weekends. Construction in all other areas cannot occur after 10:00 pm.[5] Similarly, in Maricopa County, Arizona, construction in residential areas can take place between 5:00 am or 6:00 am (depending on the time of year) and 7:00 pm. In non-residential areas, construction must end at 10:00 pm.[6] Other municipalities establish decibel limits that effectively preclude nighttime construction.[7] Under the revised ozone NAAQS, jurisdictions with few options for compliance may consider daytime construction moratoria, which coupled with the

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[3] *See Solid Waste Agency of Northern Cook County v. Army Corps of Engineers,* 531 U.S. 159, 174 (2001)(the government's action "would result in a significant impingement of the States' traditional and primary power over land and water use."); *see also Raponos v. United States,* 547 U.S. 715, 738 (2006)("Regulation of land use...is a quintessential state and local power.").

[4] TNRCC Chapter 14, *proposed*, Control of Air Pollution from Motor Vehicles Rule Log Number 2001-025a-114-AI

[5] Seattle, Wash, Mun. Code § 25.08.425 (2009).

[6] Maricopa Cnty., Ariz., Hours of Construction Ordinance §102 (2004).

[7] *See., e.g.,* D.C. Mun. Regs., tit. 20, §2802.2 (1977)(requiring construction activities occurring between 7:00 pm and 7:00 am to adhere to the maximum noise levels prescribed for all activities occurring during that time.

prevalence of noise ordinances, will make it increasingly difficult to build a home during the summer months — when construction typically takes place.

Impact Fee

In California, the San Joaquin Valley local air quality district adopted an indirect source rule that imposes an impact fee on developers and builders of up to $1,772 per home.[8] The air quality district based this figure on the projected air pollution generated by diesel construction equipment and the presumed transportation-related air pollution generated by future homeowners while commuting between employment centers and these housing developments.[9]

States desperate for emissions reductions and revenue generation may seize these types of programs without considering the ancillary adverse impacts, such as a reduction in affordable housing.

AIR v. EPA

A recent Ninth Circuit decision also demonstrates a way in which the home building industry could be adversely impacted by a more stringent ozone NAAQS. In 2012, the Ninth Circuit ruled in Association of Irritated Residents v. EPA that reductions in vehicle miles traveled (VMTs) cannot be calculated by using aggregate emissions reductions resulting from more efficient vehicles.[10] For areas designated as severe non-attainment, the CAA requires states to adopt transportation control measures to offset an increase in VMTs and reduce motor vehicle emissions.[11] Thus, jurisdictions designated as severe non-attainment areas that are located within the Ninth Circuit can no longer use aggregate emissions reductions to fully satisfy CAA section 176.52. It remains to be seen whether other circuits will apply this reasoning once the more stringent NAAQS requirements are realized.

NAHB is concerned that a more stringent NAAQS, coupled with decisions like Association of Irritated Residents, may force jurisdictions into land use decisions that are incompatible with local jurisdictions and detrimental to the housing industry. H.R. 3438 would subject these substantially reduced standards to judicial review and protect small businesses from the excessive expense and potential tumult in the event the new standards are eventually overturned.

Department of Labor Overtime Regulation

NAHB has also been greatly concerned about the significant changes the U.S. Department of Labor (DOL) has made in its proposal to amend the overtime requirements under the Fair Labor Standards Act's (FLSA) administrative, executive, professional, and outside sales exemption (i.e. "the white collar exemption"). The proposal raises the exemption's salary threshold from $455 per week to $970 per week, which represents an unprecedented increase of over 102 percent. NAHB is concerned that such a

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[8] The fee covers developments with 50 or more housing units.
[9] District Rule 9510, Indirect Source Rule, San Joaquin Valley Air Pollution Control District, Adopted December 15, 2005.
[10] *Association of Irritated Residents v. U.S.E.P.A,* 686 F.3d 668, 678-681 (9th Cir. 2012).
[11] 42 U.S.C. § 7511a(d).

sudden and dramatic change will reduce job advancement opportunities and employment flexibility for full-time construction supervisors, while leading to construction delays, increased costs, and less affordable housing.

DOL estimates that 4.6 million currently exempt workers would become entitled to overtime pay in the first year the proposal takes effect. According to DOL, the average annualized direct employer costs to implement the rule would be between $239.6 million and $255.3 million per year. In addition to the direct costs, transferred income from employers to employees would be between $1.18 and $1.27 billion. Each affected business would incur $100 to $600 in direct costs and an additional $320 to $2,700 in payroll costs.

NAHB analysis shows that approximately 116,000 construction supervisors would be affected by the proposal.[12] More than 31 percent of total employment for this occupation class sector would no longer be eligible for the exemption. However, a separate membership survey shows that the proposal is unlikely to result in an increase in workers' take home pay. The survey data reveals that employers would take steps to restructure their workforce or scale back on pay or benefits to avoid the overtime requirements. In the same survey, 44 percent of builders stated that the proposal will result in higher home prices.

Although DOL contends that this rule will ensure that the FLSA's overtime protections are appropriately applied, the agency has taken an overly broad approach that will cause problems and unintended consequences that have not been explored. NAHB strongly opposes the overtime proposal. H.R. 3438 would ensure the financial impact of this rule on home builders and other small businesses is properly mitigated.

Increased Public Participation in Rulemaking – H.R. 2631

NAHB believes that increased public participation in the rulemaking process will ultimately aid rulemaking agencies in issuing better regulations that consider the full costs of compliance for home builders while providing for improved health and safety for workers and consumers alike.

H.R. 2631, the *Regulatory Predictability for Business Growth Act of 2015*, would ensure rulemaking agencies appropriately solicit public comment for significant changes to existing, longstanding interpretive rules in accordance with congressional intentions when it passed the APA in 1946. Increasingly, regulatory rulemaking agencies have utilized changes to interpretive rules as a loophole to avoid public notice of proposed rulemaking and comment requirements. This has silenced the regulated community and ultimately produced lower-quality regulations.

What follows are examples in which regulatory rulemaking agencies avoided public notice and comment requirements by issuing interpretive rules in lieu of rulemaking.

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[12] *See* attachment, "Occupation of First-Line Supervisors of Construction Trades and Extraction Workers," National Association of Home Builders, Housing Economics and Policy Group (July 2015).

EPA and the Clean Water Act

An excellent example of the need for H.R. 2631 is the lack of clarity with respect to the scope of waters protected under the Clean Water Act (CWA). Since its inception, the CWA has helped to make significant strides in improving the quality of our water resources and, ultimately, the quality of our lives. Under the CWA, home builders must obtain and comply with section 402 storm water and 404 wetlands permits to complete their projects. A regulatory scheme that is consistent, predictable, timely, and focused on protecting true aquatic resources is most important to these compliance efforts. Unfortunately, such a permitting program is becoming more and more elusive.

Prior to the regulation that was finalized earlier this year,[13] the most recent CWA regulation addressing the scope of jurisdiction was finalized in 1986. The use of interpretive guidance over a 29-year span is particularly troublesome due to a number of Supreme Court decisions that subsequently limited the CWA's reach. Rather than working with the business community and following the congressionally mandated rulemaking process to translate the Court's directives into a workable framework, the EPA and the Army Corps of Engineers (the agencies) issued interpretive guidance documents that have only created more confusion and disarray.

Supreme Court decisions lead to interpretive guidance

The Supreme Court offered two major decisions that have changed the scope of CWA jurisdiction. In 2001, the Court decided *Solid Waste Agency of Northern Cook County v. Corps (SWANCC)*.[14] In *SWANCC*, the Court addressed the reach of the term "waters of the United States" and held that isolated, intrastate, non-navigable waters could not be regulated under the CWA based solely on the presence of migratory birds. In response to *SWANCC*, and in an attempt to clarify and standardize the way that jurisdictional decisions were made, the agencies issued guidance in 2003 as part of an Advanced Notice of Proposed Rulemaking on the regulatory definition of "waters of the U.S." Unfortunately, the Administration ultimately decided not to move forward with the rulemaking process but the guidance remained in force.

Due to increased confusion over jurisdictional authority, in 2006 the Supreme Court again considered the definition of "waters of the U.S." in *Rapanos v. United States.*[15] *Rapanos* concerned two consolidated cases: *Rapanos v. United States*,[16] and *Carabell v. U.S. Army Corps of Engineers*[17] (collectively *Rapanos*). Both cases followed the same, familiar fact-pattern: wetlands miles away from traditional navigable waters that drained through multiple ditches, culverts and creeks, which eventually flowed to traditional navigable waters. In both matters, the Sixth Circuit upheld the Corps'

[13] The new regulatory definition of "Waters of the United States" became effective on August 28, 2015. On October 9, 2015, the U.S. Court of Appeals for the Sixth Circuit issued a nationwide stay against the enforcement of the new rule. The legal case is ongoing.
[14] *Solid Woste Agency of Northern Cook County v. U.S. Army Corps of Eng'rs.,* 531 U.S. 159 (2001).
[15] *Rapanos v.* United States, 126 S.Ct. 2208 (2006).
[16] *Rapanos v.* United States, 376 F.3d 704 (6th Cir. 2004).
[17] *Carabell v.* U.S. Army Corps of Eng'rs.,391 F.3d 704 (6th Cir. 2004).

determinations that wetlands, connected through an attenuated aquatic chain to navigable-in-fact bodies, were jurisdictional.

The Court issued a 4-1-4 plurality opinion. Five of the *Rapanos* Justices concurred in the judgment that the Corps' assertion of jurisdiction under the hydrologic connection theory was impermissible, and they vacated the Sixth Circuit's decisions affirming the agency's actions.[18] However, the justices could not form a majority as to the proper test for CWA jurisdiction.

Some have maligned *Rapanos* because the justices failed to reach a majority opinion. In an effort to interpret the Court's decision, the agencies initially issued a series of memorandums attempting to spell out which classes of water bodies are subject to CWA jurisdiction given the court decision in the *Rapanos* case. In June 2007, a full year after the *Rapanos* decision, the agencies finally issued "Guidance Regarding Clean Water Act Jurisdiction after *Rapanos*." This guidance had the same effect and force as a regulation, but never went through the formal rulemaking process.

NAHB acknowledges that the Court's rulings imposed a difficult and challenging burden on the agencies. Drafting a regulation and moving it through the APA process to define what waters are federally jurisdictional is daunting. Even the Supreme Court failed to figure it out. But the path forward should not rely on bureaucrats developing regulation disguised as guidance, with no oversight, industry input, nor consideration of the cost and benefits. The solution is to work with all stakeholders and develop a workable regulatory framework. But if agencies are going to try to "backdoor" regulations by concealing them as guidance, Congress must step in to restore the integrity of the rulemaking process. H.R. 2631 would do exactly that.

Agency Rulemaking Needed to Clarify the CWA's Jurisdictional Scope

The agencies' initial reaction to *Rapanos* made a difficult regulatory program even more complicated. Prior to the issuance of the guidance, NAHB frequently heard from its members that field operations had come to a grinding halt and that the Corps' personnel were not making jurisdictional determinations because the law was unclear. It was commonly reported that the Corps' districts had not made any decisions on "navigable waters" jurisdiction between the time when *Rapanos* was handed down in June 2006 and the guidance was issued in June 2007.

The agencies decision to use guidance is troubling. It goes beyond reason why the agencies did not opt to follow an open and transparent rulemaking process. The guidance never received any APA protections, such as a cost-benefit analysis or opportunity for public comment. The agencies only requested public comments on the guidance implementation. The guidance provided extensive policy changes without the legally required protections. As a result, the guidance appears to be more of a mandate than a clarification, more of an expectation than an option, thus more of a regulation than mere advice.

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[18] *Rapanos,* 126 S.Ct. at 2235 (Scalia, J., plurality); Id. at .2252 (Kennedy, J., concurrence).

The substance of the guidance also is a cause for concern. While the guidance provides some criteria upon which decisions can be made, it lacks the clarity and consistency needed for a nationally applicable program. One of its primary goals is to "ensure nationwide consistency, reliability, and predictability in our administration of the statute."[19] Implementation was inconsistent within and across the agencies, resulting arbitrary requirements that differed across the country. Led by the lack of clarity, the failure to provide a set of defensible definitions, and the absence of a reasonable decision-making process, the guidance was a regulatory nightmare from the start. Most troubling is that any remedy for judicial review of the guidance is uncertain, and would require litigation over the very issue of whether the guidance is "final agency action" subject to court scrutiny.

The "Waters of the United States" Rule Is Not the Answer

In the wake of *Rapanos*, there now is even greater need for regulations to provide a comprehensive set of rules regarding which water bodies the agencies will regulate as waters of the United States. After hearing the pleas from the regulated community, on April 21, 2014, the agencies proposed a rule redefining the scope of waters protected under the CWA. Unfortunately, the proposed rule falls well short of providing the clarity and certainty the construction industry seeks. This rule will increase federal regulatory power over private property and will lead to increased litigation, permit requirements, and lengthy delays for any business trying to comply. Equally important, these changes will not significantly improve water quality because much of the rule improperly encompasses water features that are already regulated at the state level. While we applaud the agencies' desire to provide a rulemaking, this rule goes well beyond the bounds of federal regulatory authority under the CWA.

DOL Employee Misclassification Guidance

To combat misclassification of employees as independent contractors, U.S. Department of Labor (DOL) Wage and Hour Division Administrator David Weil on July 15, 2015 issued an administrator's interpretation regarding application of the standards for who is an employee under the Fair Labor Standards Act (FLSA). The guidance purported to provide meaningful and comprehensive guidance to all employers and employees regarding its interpretation of the standards set forth in the FLSA. The guidance, however, represents a significant shift in the focus on the standards traditionally relied upon by employers, and especially home builders.

In the administrative interpretation, DOL rejects the common law control test and affirms that six economic realities factors guide the proper determination of whether a worker is truly an independent contractor rather than an employee. The six factors in the "economic realities" test include:

1. Whether the work performed is an integral part of the company's business;
2. Whether the worker's managerial skills affect the company's opportunity for profit or loss;
3. Whether the worker is retained on a permanent or indefinite basis;
4. Whether the worker's investment is relatively minor as compared to the company's investment;
5. Whether the worker exercises business skills, judgment and initiative in the work performed; and,

[19] *Rapanos* Guidance, Appendix A, p. 4.

6. Whether the worker has control over meaningful aspects of the work performed.

Key to the administrator's interpretation is that no single factor, including the nature and degree of the company's control, is determinative. Instead, the interpretation concludes that each factor should be used as a guide to answer the ultimate question of economic dependence or independence.

While Administrator Weil argues there has not been a formal change in the legal standard, the interpretation of the independent contractor classification in the eyes of DOL appears to be substantially different. Home builders' lack of direct control over subcontractors historically placed home builders on solid footing with regard to employee classification; however, the new emphasis on economic dependence represents a significant shift.

NAHB strongly believes the Wage and Hour Division wrongfully issued guidance in lieu of a formal rulemaking, thus depriving the industry an opportunity to publicly comment. NAHB is equally concerned with the lack of employer compliance assistance provided by DOL. In 2009, the Wage and Hour Division ceased issuing opinion letters at the beginning of President Obama's administration. These opinion letters provided clarity to employers seeking counsel from the Administration on complicated workforce issues, like employee classification. While Administrator Weil claims the July 15th guidance will provide meaningful direction to all employers, the lack of individual compliance assistance in the form of opinion letters coupled with the new focus on economic dependence will leave employers ill-informed and unprepared for this aggressive enforcement environment.

Floodplain Management (FEMA)

New national policy on floodplain management is currently being imposed by the Administration without being subject to a formal rulemaking process or obtaining any meaningful public input. This will greatly affect how and where new development, redevelopment and construction may occur.

On January 30, 2015, President Obama signed Executive Order (EO) 13690 creating a Federal Flood Risk Management Standard (FFRMS) for federally funded projects (including private projects with federal grants, loans or financing) that will expand the definition of "floodplain" well beyond the long-accepted 100-year floodplain. Since 1977, the term "floodplain" has meant that area subject to a 1%-or-greater chance of flooding in any given year – the 100-year storm event. Now, federal agencies will have three options for establishing the new FFRMS elevation and flood hazard area:

- Climate-informed Science Approach – Using the best-available data and methods that integrate current and future changes in flooding.
- Freeboard Value Approach – Adding an additional two or three feet of freeboard to the base flood elevation of the 100-year flood.
- 500-year Elevation Approach – The area subject to flooding by the 0.2%-annual-chance flood.

FEMA issued implementing guidelines to instruct agencies on how to interpret the EO. While FEMA allowed for a comment period, the new interpretation of floodplain was predetermined and not subject to public comment. Therefore, no matter the type or weight of the evidence provided by the public, this

input was not incorporated into the revision of the longstanding definition a floodplain. NAHB believes that this is not the public process contemplated by the APA.

The new expanded floodplain will be subject to additional requirements, including floodplain avoidance, mitigation, and increased elevation and resilience standards. Project time requirements and costs will undoubtedly increase. These delays and increased construction costs pose a serious threat to housing affordability in communities along the nation's rivers and coasts.

Conclusion

In crafting the APA, Congress clearly intended to let regulated communities provide meaningful input when regulations are developed, and to allow judicial review to serve as a check on unelected bureaucrats. Unfortunately, all too often federal regulatory agencies view APA compliance as either a technicality of the federal rulemaking process or, worse yet, unnecessary. And existing case law has rendered the judicial review requirements of the APA ineffective.

The legislation discussed here today would codify and help to restore the intent of Congress when it passed the Administrative Procedures Act in 1946. In so doing, the legislation would reduce the burdens that poorly designed regulations place on small businesses while providing for more effective health and safety measures for workers and consumers.

Thank you again for the opportunity to testify today.

Mr. MARINO. Mr. Noe.

TESTIMONY OF PAUL R. NOE, ESQ., VICE PRESIDENT FOR PUBLIC POLICY, AMERICAN FOREST & PAPER ASSOCIATION

Mr. NOE. Thank you. Chairman Marino, Ranking Member Johnson, and Members of the Subcommittee, my name is Paul Noe, and I want to thank you for the opportunity to be here today on behalf of the American Forest and Paper Association, the American Wood Council, and their members on two bills to make important reforms to the Federal rulemaking process.

We applaud these bills because we believe they are important steps to increase regulatory transparency and fairness, harmonize regulatory requirements, avoid wasting limited resources, and increase regulatory certainty. H.R. 2631 would require public notice and comment when agencies issue an interpretive rule that conflicts with, or is inconsistent with a, previous longstanding interpretive guidance.

This is consistent with the principles of due process, transparency, and accountability that are the foundation of the APA. After the Supreme Court's Mortgage Bankers decision, it is clear that an agency can reverse the binding policy reflected in a longstanding, definitive interpretive rule by simply issuing a contrary interpretive rule. In other words, an agency can change its binding policy from "X" to "not X" without having provided the public notice and an opportunity for comment.

As a practical matter, by regulating through interpretive guidance rather than legislative rules, an agency often can avoid not only public review but OMB review, court review, and congressional oversight. That is not good government. As the D.C. circuit put it, the phenomenon we see in this case is familiar.

Congress passes a broadly-worded statute. The agency follows with regulations containing broad language, open-ended phrases, ambiguous standards, and the like. Then as years pass, the agency issues circulars or guidance or memoranda explaining, interpreting, defining, and often expanding the commands and the regulations. Law is made without notice and comment, without public participation, without publication in the Federal Register, or the code of Federal regulations.

Many authorities have gone beyond H.R. 2631 to recommend pre-adoption notice and comment for all significant guidance, including the administrative conference of the United States, the U.S. Food and Drug Administration, and the American Bar Association. H.R. 2631 has a more modest scope by proposing pre-adoption notice and comment for interpretive rules, not policy statements, that conflict with or are inconsistent with prior interpretive guidance that have been in effect for a year or more. This bill is a good step toward addressing the problem of regulation by guidance.

The other bill, H.R. 3438 would, pending judicial review, postpone the effective date of high-impact rules that may impose an annual cost on the economy of not less than $1 billion. This bill would promote certainty, efficiency, and legal integrity in the regulatory process.

All too often regulations requiring major capital investments are struck down in court, and this is an increasing trend, I believe.

H.R. 3438 would avoid wasting resources, stranding assets, and ensure that rules are legally sound before billions of dollars in investment are made.

One example of how this rule effects the U.S. forest products industry is EPA's Boiler MACT rules. In 2007, about $200 million in compliance investments were stranded in the paper and wood products industry when a court struck down the 2004 Boiler MACT rules just 3 months before the compliance deadline.

When the rules were reissued in 2013, the new standards had changed significantly, and previous investments proved to be the wrong approaches to achieve compliance. Wasting limited capital undermines the competitiveness of U.S. businesses and impedes growth in job creation. One suggestion I would submit for the Subcommittee to consider is to broaden the definition of high-impact rules to ensure that highly consequential rules, such as the Boiler MACT rules, are covered.

In conclusion, H.R. 2631 and H.R. 3438 take important steps to promote transparency, certainty, efficiency, and fairness in the regulatory process. We support these efforts, and we would be happy to work with the Committee as it advances these proposals through the legislative process.

Mr. Chairman, I request permission to include in the record documents referenced in my testimony. I thank you.

Mr. MARINO. Without objection. And I apologize, sir, I believe your name is pronounced Noe?

Mr. NOE. Yes, sir.

Mr. MARINO. I apologize for that.

Mr. NOE. Thank you.

[The prepared statement of Mr. Noe follows:]

American Forest & Paper Association

AMERICAN WOOD COUNCIL

Testimony of
Paul R. Noe
Vice President for Public Policy
American Forest & Paper Association
American Wood Council

Hearing on H.R. 2631, the Regulatory Predictability for Business Growth Act of 2015, and H.R. 3438, the Require Evaluation before Implementing Executive Wishlists (REVIEW) Act of 2015
before the
Subcommittee on Regulatory Reform, Commercial and Antitrust Law
Committee on the Judiciary
U.S. House of Representatives
November 3, 2015

On behalf of the American Forest & Paper Association (AF&PA) and the American Wood Council (AWC) and their members, I want to thank Chairman Marino, Ranking Member Johnson and the other members of the Subcommittee for the opportunity to testify on two bills proposing to make important reforms to the federal rulemaking process: H.R. 2631, the Regulatory Predictability for Business Growth Act of 2015, and H.R. 3438, the Require Evaluation before Implementing Executive Wishlists (REVIEW) Act of 2015. For over 25 years, I have worked on regulatory issues and regulatory reform from the perspective of trade associations, in private practice, at the U.S. Office of Management and Budget's Office of Information and Regulatory, and as senior counsel for the Senate Committee on Governmental Affairs.

AF&PA serves to advance a sustainable U.S. pulp, paper, packaging, and wood products manufacturing industry through fact-based public policy and marketplace advocacy. AF&PA member companies make products essential for everyday life from renewable and recyclable resources and are committed to continuous improvement through the industry's sustainability initiative - *Better Practices, Better Planet 2020*. The forest products industry accounts for approximately 4 percent of the total U.S. manufacturing GDP, manufactures over $200 billion in products annually, and employs approximately 900,000 men and women. The industry meets a payroll of approximately $50 billion annually and is among the top 10 manufacturing sector employers in 47 states.

AF&PA's sustainability initiative - *Better Practices, Better Planet 2020* - is the latest example of our members' proactive commitment to the long-term success of our industry, our communities and our environment. We have long been responsible stewards of our planet's resources. Our member companies have collectively made

significant progress in each of the following goals, which comprise one of the most extensive quantifiable sets of sustainability goals for a U.S. manufacturing industry: increasing paper recovery for recycling; improving energy efficiency; reducing greenhouse gas emissions; promoting sustainable forestry practices; improving workplace safety; and reducing water use.

The American Wood Council (AWC) is the voice of North American wood products manufacturing, representing over 75 percent of an industry that provides approximately 400,000 men and women with family-wage jobs. AWC members make products that are essential to everyday life from a renewable resource that absorbs and sequesters carbon. Staff experts develop state-of-the-art engineering data, technology, and standards for wood products to assure their safe and efficient design, as well as provide information on wood design, green building, and environmental regulations. AWC also advocates for balanced government policies that affect wood products.

We recognize that sensible regulations provide many important benefits, including protecting the environment, health and safety. The paper and wood products manufacturing industry has met many costly regulatory challenges over the years, spending billions of dollars as part of its environmental stewardship. Those investments have led to major improvements in air quality, such as a 22 percent reduction in emissions of nitrogen oxide (NOx) and 42 percent for sulfur dioxide (SO2) by our pulp and paper facilities since 2000. Unfortunately, the industry faces new regulatory challenges – many driven by lawsuits under the Clean Air Act – that together could impose more than $10 billion in new capital obligations on the industry over the next decade, a regulatory burden that could be unsustainable.

Along with the cumulative cost, complexity and sheer number of regulations, the uncertainty in the federal regulatory process creates major challenges for investment, capital planning, and job creation.[1] We believe that the two bills before the committee – H.R. 2631 and H.R. 3438 – would help to increase regulatory transparency, harmonize regulatory requirements, avoid wasting limited resources, and increase regulatory certainty.

H.R. 2631

H.R. 2631 would amend the Administrative Procedure Act (APA) to require public notice and comment when agencies issue an interpretive rule that conflicts with or is inconsistent with a previous longstanding interpretive rule. While the Supreme Court recently held in Perez v. Mortgage Bankers Association that the APA does not require

[1] See, e.g., W. Mark Crain and Nicole V. Crain, "The Cost of Federal Regulation to the U.S. Economy, Manufacturing, and Small Business," prepared for the National Association of Manufacturers (Sept. 10, 2014)(finding that the regulatory burden for the average U.S. manufacturer is $19,564 per employee per year); Steven Globerman and George Georgopolous, "Regulation and the International Competitiveness of the U.S. Economy," Mercatus Center, George Mason University (Sept. 2012)(finding that the regulatory environment in the U.S. has become less favorable to private-sector activity in recent years compared to other countries, and declining productivity is a plausible consequence of an increasingly complex and uncertain U.S. regulatory environment).

notice and comment for an interpretive rule that reverses a prior interpretive rule, H.R. 2631 is consistent with the principles of due process, transparency and accountability that are the foundation of the APA.

The traditional means by which an agency can create binding policy is to issue a legislative rule through public notice and comment. If the agency later wants to reverse that binding policy, it likewise must go through public notice and comment under the APA. However, agencies can avoid the notice-and-comment requirements of the APA by doing the same thing through interpretive rules that purport to "clarify" a vaguely worded statute or legislative rule. After Mortgage Bankers, it is clear that the agency can reverse the binding policy reflected in a longstanding interpretive rule by simply issuing a contrary interpretive rule. In other words, an agency can change its binding policy from "X" to "not X" without having provided the public with notice and an opportunity to comment. As a practical matter, by regulating through interpretive guidance rather than legislative rules, an agency often can avoid review not only by the public, but also by the Office of Management and Budget (OMB), the courts, and Congress. That is not a practice that should be encouraged as a matter of good government, transparency or fundamental fairness.

Over the years, many commentators, courts, Congress, OMB, and the Administrative Conference of the United States have expressed concern that agencies too often rely on guidance in ways that circumvent the notice-and-comment rulemaking process. As the D.C. Circuit put it:

> "The phenomenon we see in this case is familiar. Congress passes a broadly worded statute. The agency follows with regulations containing broad language, open-ended phrases, ambiguous standards and the like. Then as years pass, the agency issues circulars or guidance or memoranda, explaining, interpreting, defining and often expanding the commands in regulations. One guidance document may yield another and so on. . . . Law is made, without notice and comment, without public participation, and without publication in the Federal Register or the Code of Federal Regulations."[2]

Earlier in my career at OMB, I worked on a Bulletin for Agency Good Guidance Practices that, among other things, requires agencies to provide pre-adoption public notice and comment when they issue "economically significant" guidance (both interpretive rules and policy statements).[3] The basic idea was that when an agency is going to issue a guidance document that has a major real-world effect, as a matter of good government and fundamental fairness, it should provide public notice and

[2] Appalachian Power Co. v. EPA, 208 F.3d 1015, 1020 (D.C. Cir. 2000)(striking down emissions monitoring guidance as requiring notice and comment through legislative rulemaking procedures).

[3] Under the OMB Bulletin, "'economically significant guidance' . . . may reasonably be anticipated to lead to an annual effect on the economy $100 million or more or adversely affect in a material way the economy or a sector of the economy, except that economically significant guidance documents do not include guidance documents on Federal expenditures and receipts." OMB Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3439 (Jan. 25, 2009).

comment before finalizing the guidance. Other authorities have gone further to support pre-adoption notice and comment for all significant guidance, not just economically significant guidance, including the Administrative Conference of the United States, the Food and Drug Administration, and the American Bar Association.[4] H.R. 2631 has a narrower scope by proposing pre-adoption notice and comment for interpretive rules (not policy statements) that conflict with or are inconsistent with prior interpretive rules that have been in effect for a year or more. The bill would help curb the problem of "regulation by guidance."

H.R. 3438

H.R. 3438 would, pending judicial review, postpone the effective date of "high-impact rules" that "may impose an annual cost of the economy of not less than $1 billion." The bill includes an exception to allow high-impact rules to go into effect 60 days after publication in the Federal Register where no judicial review is sought.

The REVIEW Act would help promote certainty, efficiency, and legal integrity in the regulatory process. All too often, regulations requiring major capital investments are struck down in court. Critical investment decisions must be made in time to comply with a regulation, and those decisions typically require sunk costs that cannot be recovered after a rule is subsequently determined to be unlawful. H.R. 3438 would avoid wasting limited resources by ensuring that rules are legally sound before billions of dollars in investments are made.

One example of how this issue affects the U.S. forest products industry is EPA's Boiler MACT rules. In 2007, about $200 million in compliance investments were stranded in the paper and wood products industry when a court struck down the 2004 Boiler MACT rules just three months before the compliance deadline. While the rules were reissued in 2013, the new standards for industrial boilers changed significantly, and previous investments proved to be the wrong approaches to achieve compliance. Wasting limited capital undermines the competitiveness of U.S. businesses and impedes growth and job creation.

One suggestion that I would submit for the Subcommittee to consider is to broaden the definition of "high-impact rule" to ensure that highly consequential rules such as the Boiler MACT rules are covered.

[4] See FDA Good Guidance Practices, 21 C.F.R. 10.115(g) (requiring pre-adoption notice and comment for "Level 1" guidance documents); Recommendations of the Administrative Conference of the United States, Interpretive Rules of General Applicability and Statements of General Policy, Rec. 76-5, 1 C.F.R. 305.76 (1992), available at http://www.law.fsu.edu/library/admin/acus/305765.html (recommending pre-adoption notice and comment for nonlegislative rules "likely to have a substantial impact"), Am. Bar Ass'n, Annual Report Including Proceedings of the Fifty-Eighth Annual Meeting 57 (1993)(same). See generally, Paul R. Noe and John D. Graham, "Due Process and Management for Guidance Documents: Good Governance Long Overdue," 25 Yale J. on Reg. 103 (Winter 2008).

In conclusion, H.R. 2631 and H.R. 3438 take important steps to promote due process, transparency, certainty, efficiency and fairness in the regulatory process. We appreciate and support these efforts, and we would be happy to work with the Subcommittee as it advances these important proposals through the legislative process.

Mr. MARINO. Mr. Clark.

TESTIMONY OF JEFFREY BOSSERT CLARK, SR., ESQ., PARTNER, KIRKLAND & ELLIS, LLP

Mr. CLARK. Good morning, Chairman Marino, and Ranking Member Johnson, and honorable Members of the Subcommittee.

I'm very pleased to be here today. And in addition to coming to help however I can with my testimony, I wanted to note that my wife and oldest daughter are in the room. I thought it would be a good civics lesson, especially with it being voting day in my home State of Virginia.

And also, Ranking Member Johnson, my wife lived for a long time, including when we were married 20 years ago in your district, in Stone Mountain, Georgia. And she came there after she immigrated from Korea.

So with that little introduction out of the way, I can draw a straight line, I think, between my law school experiences in front of Judge Silverman, as I noted in my written testimony, to my career here at DOJ, and to sitting here with you today. And, you know, if I were a half generation younger, I'm sure I would've had Professor Buzbee as one of my professors, so I'm honored to sit alongside of him.

Administrative law really is constitutional law. It's suffused with the separation of powers, with due process concerns, and with guaranteeing Democratic accountability. And I think both of the bills that you have before you today are excellent bills that would help to accomplish promoting those constitutional ends.

The first bill, H.R. 2631, really is the product, I think, of you trying to solve a negative synergy between a number of administrative law doctrines and current provisions in the APA that the Paralyzed Veterans case enforced, and those rules are 553(b), which is what got enforced in Mortgage Bankers, Seminole Rock deference and its potential for abuse, and Chevron.

The combination of those rules really let agencies turn on a dime and defeat reliance interests by individuals in businesses like the NAHB and their members. And by imposing this new requirement that resurrects the Paralyzed Veterans doctrine, you would help to counteract all of those negative synergies.

In addition, I think there is several other advantages, which I lay out in my written testimony. I think it advances your power to, as Congress, write the laws. The argument that we often hear from the professoriate that agency processes will be ossified, I think, has really become a tired canard at this point. You get to define the Nation's policies and legislation, not really the Executive Branch or the professoriate.

Second, I think that these bills, the first bill especially, the one that reverses Paralyzed Veterans, helps to enhance the separation of powers, because it gives time for mistakes to be corrected. It doesn't allow agencies to turn on a dime. It allows agencies that are acting closer in time to the law that they passed—that was passed that, you know, is being interpreted, and so that harmonizes agency action more with congressional will.

And third, by giving that time period and making sure that there's notice and comment, you establish that there's an adversary

process, an adversary process that can inform judicial review and, thereby, also enhance the separation of powers through the process of judicial oversight. Of course, the fact that you have notice and comment enhances due process and accountability, and it helps to protect reliance interests.

In addition, it protects both public property and private property, not just private property, because many agencies regulate the actions of other Executive Branch agencies.

And third—I'm sorry, and lastly, it's not a perfect solution to the abuses of Seminole Rock deference, but it's kind of a very good second best. It's a very good first start to try to reverse those abuses.

And, you know, I note that Professor Buzbee had indicated that, you know, perhaps you might be open to seeing, you know, that bigger step of reversing Seminole Rock deference. But in the short term, I think this is a good first step toward that.

Turning to the second bill, the REVIEW Act of 2015, you know, I started my testimony with the apocrypha from Senator Dirksen of, you know, $1 billion here, $1 billion there, and pretty soon you're talking, you know, real money. I think that providing an automatic legislative stay that will be in place to allow the courts to test the legality of rules, you know, before they actually go into effect when they cross such a monumental threshold is a very good step in the right direction.

And I'll tell you in my experience as a practitioner that getting stays from the court process are very tough. I tell my clients that there's almost a macro that spits out that just says in a few paragraphs, stay denied. There's not a lot of judicial consideration of those stays, and so providing for an automatic stay in the very limited circumstance where you have a $1 billion rule is a very good step in the right direction.

Thank you.

Mr. MARINO. Thank you, Mr. Clark.

[The prepared statement of Mr. Clark follows:]

Testimony of

Jeffrey Bossert Clark, Sr.

Partner, Kirkland & Ellis, L.L.P.

To the House Judiciary Committee's Subcommittee on Regulatory Reform and Antitrust Law

November 3, 2015

Hearing on re H.R. 3438, the "Require Evaluation Before Implementing Executive Wishlists Act of 2015," and H.R. 2631, the "Regulatory Predictability for Business Growth Act of 2015."

Commentary on H.R. 3438 "Require Evaluation Before Implementing Executive Wishlists Act of 2015" and H.R. 2631 "Regulatory Predictability for Business Growth Act of 2015"

Both H.R. 3438, which requires high-impact rules costing the national economy one billion or more dollars, and H.R. 2631, which works a limited reinstatement of a D.C. Circuit administrative law innovation, are ready to go. *See Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997) *abrogated by Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199 (2015). The Congress could pass them into law now without adjustment. Nevertheless, in addition to commending these bills on multiple grounds (constitutional, statutory, and in the vein of keeping up Congress's side of an intelligent and healthy common-law dialogue with the courts), I also offer in my testimony some suggestions for improvement.

Introduction

In the Fall of 1993, I sat in a classroom at the Georgetown Law School before Judge Silberman of the D.C. Circuit, who was acting as my teacher in administrative law. Incidentally, I must say he is one of the finest teachers I have had in any discipline, not just in the law. I recall with fondest all I learned during his class. Much as I now credit my passion for high school and college debate activities for a good part of where I am today, since I now get paid by clients to engage in real-world debates in the federal courts, I now also make a living in part out of the human capital that Judge Silberman poured into me. So I remain grateful because of the paces Judge Silberman put me through in that class. My wife and two of my daughters are in the hearing room today and so, especially for my daughters' collective benefit, this lets me say that paying attention in class can pay significant dividends.

And because it is relevant to the topics for this hearing, I want to relate one particular anecdote about that class to you.

At one point, we were discussing the ability of agencies to issue regulations and then interpret them, especially regulations that attempted to redefine the jurisdictional metes and bounds that Congress had erected to limit a given agency's sphere of power. (*See City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863 (2013).) Judge Silberman asked whether, as a policy matter, agencies should be able to interpret and reinterpret the same regulatory text at will, even when by doing so the agency could interpret ambiguous statutory text to expand its delegated powers beyond what Congress saw fit to give. I responded, "no." Judge Silberman asked why. I said: "Because that collection of powers would together constitute handing over the keys of the kingdom. They would represent an enormous transfer of power away from the Congress, the body to which the Constitution assigned the lawmaking power." Judge Silberman then

posed other questions in this subject area to other students, so I am not sure that he was pleased by my answer. But for my own part I think the answer stands the test of time, even as I have now reached my twentieth year of practice in the law.

Another relevant anecdote is this. My son (who might otherwise be here) is currently a freshman at the University of Iowa. At the start of last month, I visited him while I had a string of arguments in the Midwest. He took me to his favorite bookstore. He knows his Dad well and he brought me to a glass case of books he knew I might like. After a few minutes of browsing, I picked out a finely bound edition of Montesquieu's *Spirit of the Laws*. The Framers were themselves good students who stood on the shoulders of giants of keen political minds like Montesquieu's. His analysis of the separation of powers was to find its way into the U.S. Constitution as one of the principal bulwarks of American liberty. Montesquieu, 267 years on, is as relevant to this hearing as Judge Silberman's question, posed only 22 years ago. Sadly, many of America's college and high school students probably have no idea who Montesquieu is. Yet what is old is new again. *See Mortgage Bankers Ass'n*, 135 S. Ct. at 1215-22 (Thomas, J., concurring) (arguing that administrative law has grown untethered to the separation of powers).

Administrative law, it is often forgotten, is suffused with constitutional law. Really, it ***is*** constitutional law. And how could it be any other way? The whole subject is rife with questions of inter-branch interactions, the powers of one Branch running up against or being accommodated to that of another of the three Branches, and issues of due process in regulating private persons and entities. In that vein, it is my thesis today that both of these bills would help to bring administrative law in the twenty-first century into better alignment with the provisions and tenets of the Constitution.

H.R. 2631 "Regulatory Predictability for Business Growth Act of 2015"

I hope you will indulge me in beginning with the bill that revives a good portion of the *Paralyzed Veterans* doctrine. As a constitutional matter, I think it is the far more significant bill, though as a matter of economics, H.R. 3438 is probably the more important bill, at least as long as we have an active, pro-regulatory President with a phone and a pen. *See Obama on Executive Actions: 'I've Got a Pen and I've Got a Phone,'' available at* http://washington.cbslocal.com/2014/01/14/obama-on-executive-actions-ive-got-a-pen-and-ive-got-a-phone/ (Jan. 14, 2014) (last visited Oct. 31, 2015).

Administrative law as it comes to the courts in particular regulatory fights is a curious mix of constitutional doctrine, statutory interpretation, and good-old common law. As relevant to the stage that was set for the Supreme Court's *Mortgage Bankers* case last term, the relevant legal principles and their source of their authority can be summarized on the table at the top of the next page:

Legal Principle	Source of Authority
1. Interpretive rules do not need to be adopted via notice and comment.	**Statute:** 5 U.S.C. § 553(b) of the APA.
2. Interpretive rules do ***not*** carry the force and effect of law, only legislative rules[1] do.	**Professes to Be by Statute, But in Reality Is Currently an Administrative Common Law Fiction:** 5 U.S.C. § 551(4) ("'rule' means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, ***interpret, or prescribe law or policy*** ....") (emphasis added). But in light of *Seminole Rock* deference (a common law decision), in reality interpretive rules ***do, in fact, carry*** the force and effect of law as Justice Scalia explained.
3. Courts are required, under *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984), to defer to reasonable agency interpretations of ambiguous statutory provisions that have been delegated to such an agency to interpret.	**Administrative Common Law:** No provision of the APA compels such an approach. Indeed, the APA appears to provide to the contrary: "To the extent necessary to decision and when presented, ***the reviewing court shall decide*** all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action ...." 5 U.S.C. § 706 (emphasis added). The APA does not repose such decisional power in agencies. *See also Mortgage Bankers*, 135 S. Ct. at 1211 (Scalia, J., concurring in the judgment).
4. Courts are required, under *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), to defer to agency interpretations of the agency's own regulations.	**Administrative Common Law:** No provision of the APA compels such an approach. Same APA tension as in the box immediately above as to *Chevron*.

I agree with the unanimous decision of the Supreme Court that *Paralyzed*

[1] The appellation of "legislative rules" should be curious to anyone who takes the separation of powers seriously. Though that term can perhaps be commended for its candor that when such rules are issued, the Executive Branch is, in fact, legislating and not the body to which this Subcommittee belongs. *Contrast* U.S. Const., art. I, sec. 1 ("***All legislative Powers*** herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.") (emphasis added).

Veterans is contrary to the text of the APA as it stands. But one point I agree with the *Mortgage Bankers* concurrences about (and the point is made most forcefully in Justice Scalia's concurrence) is that it is more than a bit much for the majority opinion, penned by Justice Sotomayor, to claim that Congress explicitly "weighed the costs and benefits of placing more rigorous restrictions on the issuance of interpretive rules." *Mortgage Bankers*, 135 S. Ct. at 1207. The table I set out above should help to explain why. The reason is that the fact that interpretive rules need not go through notice and comment is a statutory determination but both *Chevron* and *Seminole Rock* deference are creatures of the courts alone.[2] Nothing in the APA or its legislative history (or the Attorney General's *Manual on the APA*) shows Congress to have wrestled with how APA Section 553(b) might be used or abused in conjunction with either *Chevron* or *Seminole Rock*. *Chevron* would not be handed down until 36 years ***after*** the APA and *Seminole Rock* was only one week past one year when the APA was enacted in June of 1946.

The APA was, in many ways, intended to codify the administrative law common law decisions (and often constitutional ones) that had been handed down prior to 1946. *See, e.g.*, Attorney General's *Manual on the APA*, 108 (1947). The problem is that the administrative common law process has continued to evolve side-by-side with the textual exegesis of the APA itself. It is true that *Paralyzed Veterans* conflicts with Section 553(b). But it is hard to say that the nature of the conflict differs greatly from the arguable conflict that exists between APA Section 706 and *Chevron* — or between APA 706 and *Seminole Rock*. For that reason, I see *Mortgage Bankers* as a case less about fidelity to the textual APA (though it is certainly that) than about the jealousy by which Supreme Court reserves to itself the power to innovate in the realm of administrative common law. The D.C. Circuit is an important interlocutor in the dialogue that builds out administrative common law, but it is an inferior one. Sometimes it guesses correctly (at least when judged against the standard of what the Supreme Court wants to do) and sometimes it guesses incorrectly — as in *Paralyzed Veterans*.

As a policy matter, though, I agree with the wisdom of *Paralyzed Veterans*, which held, in relevant respect: "Once an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking." *Paralyzed Veterans*, 117 F.3d at 586. In policy terms I would only change the word "can" to "should." But since the text adopted by the Congress after it runs the constitutional gauntlet of bicameralism

[2] An argument could be made that Congress acquiesced in these decisions. I think the situation is more one where Congress has, unfortunately, become somewhat somnolent about defending its prerogatives to make the law as the Peoples' representatives in our Republican form of government and that the reality is not that Congress opted, after much heavy deliberation, to sit on the sidelines and explicitly defer to the Supreme Court in its *Chevron* and *Seminole Rock* jurisprudence. In any event, this is a complex set of topics beyond the scope of this testimony. In that vein, the Subcommittee may wish to review Michael Greve & Ashley C. Parrish, *Administrative Law Without Congress*, 22 GEO. MASON L. REV. 301 (2015).

and presentment should control over mere administrative common law, I agree that *Paralyzed Veterans* had to go.

In the excellent bill, the Regulatory Predictability for Business Growth Act of 2015," H.R. 2631, the issue is now whether to resurrect the policy behind *Paralyzed Veterans* and make it Congress's own dictate of law. Congress should do so. Justice Scalia noted that the D.C. Circuit was wrong to enact its view of policy even though it was just taking one small step toward cabining the immense powers conferred on agencies by the combination of (1) not having to use notice-and-comment procedures for interpretive rules; (2) the legal reality (not fiction[3]) that interpretive rules carry the force of law; (3) *Chevron*; and (4) *Mortgage Bankers*. He was right that because *Seminole Rock* is mere administrative common law, it is a principle that the Supreme Court is free to change. And thus as Justices Scalia, Thomas, and Alito all argued in their separate concurrences, *Seminole Rock* should be reconsidered in appropriate case. But this legislative Branch does not suffer under the same restriction that Supreme Court faces as the interpretive Branch. You can change the law. You can readopt *Paralyzed Veterans*. By doing so, you can rightfully curb the immense powers conferred on agencies by the unforeseen-to-the-Congress-of-1946 problems created by the adverse synergy of *Chevron* and *Seminole Rock* administrative common law with the express statutory differences between interpretive and substantive rules established in the APA.

I submit to you that H.R. 2631 carries the following advantages:

(1) Advancing Congress's Own Powers to Write the Laws: Whenever Congress considers APA reforms, the shop-worn argument that this would "ossify" agency processes is pulled out. *See, e.g.*, Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483 (1997). You should pay no heed to that. Administrative agencies are not mentioned in the Constitution. A purported principle that such unmentioned-administrative agencies must, as a moral imperative, be allowed to act with maximum dispatch is thus even more foreign to our intended system of government. ***First***, as a constitutional matter (as elaborated on below), passing H.R. 2631 would enhance the separation of powers and that trumps any mere policy concerns about agencies being able to act more quickly. ***Second, you***, not the Executive Branch — and not the legal professoriate — define what the country's policy aims are via legislation. It was the aim of Congress, egged on by the professoriate in the 1930s and 1940s, to empower an unelected and supposedly expert bureaucracy. *See, e.g.*, James Landis, THE ADMINISTRATIVE

[3] The fiction that interpretive rules do not have the force of law traces to *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995) — and now to *Mortgage Bankers'* reaffirmance of that principle.

PROCESS 24 (1938) ("If the administrative process is to fill the need for expertness, obviously, as regulation increases, the number of our administrative authorities must increase.... Efficiency in the processes of governmental regulation is best served by the creation of more rather than less agencies."). That does not have to be your unalloyed, single-minded objective in 2015 (and whether it ever should have been a worthy objective even in the past is quite dubious). Moreover, policy experience has not stood still since 1938 or 1946. We can now see there are not just upsides to government by so-called experts but significant downsides.[4] You can adjust the relative reliance on bureaucrats and the speed with which they can act out their wills. And H.R. 2631 is just a small step in that direction.

(2) Advancing the Separation of Powers and Checks & Balances: Under their *Chevron* powers, the agencies are writing vast bodies of laws. Yet the principal law writers should be the Congress. By adopting H.R. 2631, you not only wrest some general law-writing power delegated to agencies back from them, you also ensure that you have the time to step in to correct agency misreadings of the congressional will that you are content to leave delegated.

Look at it this way: As is a common place in administrative law (including in the realm of *Skidmore* deference[5]) the first agency to interpret a new law is the one closest to the congressional will. Agencies know that an infant law is closely watched by its proud parents in Congress and thus the agencies will be on their best behavior while under such watchful eyes. But now that *Paralyzed Veterans* is no more, as a law grows old, agencies may change their interpretations (and under *Seminole Rock* they are empowered to hold regulated parties' feet to the fire of any new interpretations), effectively ***turning on a dime***. By imposing notice-and-comment procedures on attempts to change early regulatory interpretations, you are not faced with *faits*

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[4] In this vein, I always think of the Nobel Prize-winning creation of public choice economics as expounded in works like the *Calculus of Consent: Logical Foundations of Constitutional Democracy*, by James M. Buchanan and Gordon Tullock. Indeed, Buchanan's own intellectual evolution illustrates the same point. He went from adhering to socialism earlier in his life to becoming a defender of the market order in his economic works. *See* Niclas Berggren, *James M. Buchanan Jr.*, 10 ECON J. WATCH 292, 292 (2013), *available at* http://econjwatch.org/file_download/718/BuchananIPEL.pdf (last visited Nov.1, 2015).

[5] *See also, e.g., Cleary ex rel. Cleary v. Waldman*, 167 F.3d 801, 808 (3d Cir. 1999) ("Under the *Skidmore* [*v. Swift & Co.*, 323 U.S. 134 (1944)] analysis outlined above, we must probe further to determine whether the interpretation is consistent and contemporaneous with other pronouncements of the agency and whether it is reasonable given the language and purpose of the Act."). As an aside, *Skidmore*, among the various species of deference including *Chevron* and *Seminole Rock*, is particularly candid in noting that it is a common law judicial creation: "There is no statutory provision as to what, if any, deference courts should pay to the Administrator's conclusions." *Skidmore*, 323 U.S. at 139.

accomplis. Instead, not only the regulated public, but this body would receive advance notice and could exercise its oversight to deter changed interpretations you disapprove of. H.R. 2631 thus gives you a tool to check the Executive Branch when needed.

And, of course, it goes without saying that since the task of interpreting the law is principally one entrusted to the Judicial Branch, H.R. 2631 will also help advance the separation of powers in that realm as well by ensuring that changed agency interpretations will be more deliberate and will inherently be subjected to more penetrating judicial review. *See* Advantage (5) below.

(3) Advancing Due Process Interests: Regulations in America effect all aspects of law — from civil to criminal, and thus from areas impinging on property to areas impinging on liberty. By imposing notice-and-comment procedures on changes in the longstanding regulatory interpretations you give regulated parties the chance to both timely and meaningfully oppose changes in regulatory interpretations or simply to adjust their affairs to take account of a new regulatory world. Doing that is just a species of fundamental fairness.

(4) Advancing the Protection of Private (and Public) Property: Millions or more dollars in the private sector can be invested in reliance on specific agency interpretations of statutes or regulations. Economic surpluses that grow not just business profits but that create or sustain jobs should not be able to be made to go "poof" with a flick of the bureaucratic pen. The Fifth Amendment's bulwark of property protections are also advanced by H.R. 2631. The Judiciary Committee and this Subcommittee have embedded a recognition of these points in the very title of the bill, noting that the bill is designed to enhance regulatory predictability (both a property and a due process value) and to enhance business growth (a property value).

Indeed, since in America we have a peculiar system where one agency can regulate another, especially in the environmental area (where the rulemakings are the most expensive), reliance interests in public property are similarly defended. As I learned up close and personal while the Deputy Assistant Attorney General for appellate litigation in the Environment and Natural Resources Division of the Department of Justice, EPA and the Interior Department, for instance, frequently issue rules that can impinge on the Defense Department or on the use and administration of federal property owned by any agency. Notice would thus give other parts of the federal family the time to react to potentially expensive and burdensome changes in federal regulatory interpretation. Accordingly, the advantages of H.R. 2631

would not accrue to private parties alone.

(5) Bolstering Effective Judicial Review: As you are aware, judicial review is confined to review judged against the four corners of an administrative record. If agencies do not have to give advance notice of potential changes in their legal interpretations, and especially where they do not have to grapple with the comments filed by interested parties, the administrative record can tend to be rather a one-sided affair. More than that, agencies can be tempted to abuse their powers to skew the administrative record toward including only materials that support the changed interpretation. The antidote to that is the introduction of adversariness. This will ensure that all relevant legal and policy concerns are aired before a changed agency interpretation can truly lock in. And H.R. 2631 will do just that.

(6) Countering the Strategic Potential for Abuse of *Seminole Rock* Deference: As the concurring *Mortgage Bankers* Justices recognized, Professor John Manning spotted the potential for abuse that in part led to *Paralyzed Veterans*. *See* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612 (1996), *cited in Paralyzed Veterans*, 117 F.3d at 584. The concern is that under *Seminole Rock*, if agencies must be deferred to when their regulations are ambiguous, then they are given every incentive to write such regulations precisely so they can maximize their power to interpret them in the future. This temptation grows over time, especially in periods where Congress is not passing large numbers of new statutes. Agencies are then incentivized in many cases to look for ways to make new policy on its own. The full antidote to the strategic overreaching that *Seminole Rock* can lead to would be for the Supreme Court to overrule that case, which two Justices (Scalia and Thomas) appear to be calling for and which a third (Alito) thinks should be on the table for judicial consideration. But shy of the full antidote, restoring *Paralyzed Veterans* in a core of important cases would prove a welcome second-best measure. This is because (as per Advantage (5) above), by giving sharper teeth to judicial review, agencies would face more challenges and ones from better-equipped challengers when they were arbitrarily altering long-settled interpretive decisions. In short, H.R. 2631 solves the problem of negative synergies between, on the one hand, the *Seminole Rock* powers agencies possess to write ambiguous regulations, thereby enlarging their powers, and, on the other, the ability to costlessly interpret and reinterpret, as they see fit, their interpretations to push the reach of regulations ever outward.

Turning from general advantages to the specific stopping points of this bill, I also

commend the sponsors for what they have done in H.R. 2631. The bill does not restore all of *Paralyzed Veterans* but instead limits itself to requiring notice-and-comment procedures only for changes to "longstanding interpretive rule[s],"[6] *i.e.*, those that have been in place for at least one year. This reflects a balancing that requires a period of time before reliance interests will be presumed to have truly built up around a rule.

In sum, I lend my expert support for H.R. 2631. I cannot think of how it can be improved. There are those who might argue that you should tackle dismantling *Seminole Rock* deference first. And I share Professor Manning's (and several jurists') concerns about that doctrine. But the aims of H.R. 2631 are appropriately more modest and more targeted to bringing back the benefits (as modulated ever so slightly) of *Paralyzed Veterans* back to administrative law. Incrementalism is not to be scoffed at.

H.R. 3438 "REVIEW Act of 2015"

I similarly support the REVIEW Act of 2015, which would impose an automatic stay pending judicial review of any regulations that involve costs of one-billion dollars or more. Even in the twenty-first century, a billion dollars is "real money." *See* Wikiquotes ("A billion here, a billion there, pretty soon, you're talking real money.") (explaining that Senator Dirksen, to whom this quotation is often attributed, appears never to have actually uttered these words, quoting the Senator as saying: "Oh, I never said that. A newspaper fella misquoted me once, and I thought it sounded so good that I never bothered to deny it."), *available at* https://en.wikiquote.org/wiki/Everett_Dirksen (last visited Nov. 1, 2015).

Judicial stays can be quite difficult to come by. Sometimes I tell other lawyers in the field that the D.C. Circuit has a computer macro that spits out a denial of rulemaking stays citing to a case involving *WMATA*. *See WMATA v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977). Such decisions usually go unpublished and rarely set out explicit reasoning for denial. Experienced D.C. Circuit practitioners have a "feel" for what kinds of rulemakings can chin the bar (though they are *rarae aves*). The four factors in *WMATA* or the other famous D.C. Circuit stay case, *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921 (D.C. Cir. 1958), are basically just an application of the basic

[6] Indeed (while fully recognizing this remark is tongue-in-cheek), the bill also seems to be worth the price of admission just because it eliminates the cumbersome term "interpretative" from the text of the APA and replaces it with the more felicitous term "interpretive." This will save me from having to edit out the word "interpretive" from the text of briefs that come to me in first draft from a law-firm associate (or, that came to me from 2001-2005 from federal lawyers, for that matter). It can be hard enough in administrative law cases to simplify complex statutes, complex regulations, and complex scientific and economic facts. The last thing one needs on top of that is needlessly complex terminology that no one uses outside this field of law. When was the last time any ordinary speaker of the English language announced: "My friends, we have an interpretative dispute on our hands"?

rules of equity. *See, e.g., eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391-92 (2006). As with doctrines of the common law, nothing prevents Congress from overriding the background law of equity and fashioning a rule better to its liking. And the modification here of the discretionary stay approach under the four-factor balancing test in *WMATA* and *Petroleum Jobbers* — and their progeny —is quite modest. It applies only to billion-dollar-plus rules. While such rules are on the rise, they are not everyday events.[7] Critics of H.R. 3438 would likely argue that rules of this magnitude are often in the environmental area and thus an automatic stay will deprive people of the health benefits of these rules. A critique of how EPA and other environmental agencies reckon the benefits of environmental rules is beyond the scope of this testimony but it is possible to make some basic observations that cut against this critique.

First, the economy continues to be anemic while the pace of new regulations is decidedly not. *See supra* n.6. Agency claims they have accurately calculated costs and benefits should not be conclusively presumed, but instead should first be tested in courts. This is a mere anecdote, but I will note I am involved in Seventh Circuit litigation for a client where the Department of Energy reckoned costs and benefits in an energy-efficiency rule that applies to supermarket refrigeration equipment by assuming that no reduction in demand would occur even where equipment prices would increase significantly. That's patently absurd. DOE also blew hot and cold on whether they were justifying the rule based on the so-called "social cost of carbon." DOE said one thing in the *Federal Register* and quite another to the Seventh Circuit in briefing. The view that expert agencies are accurately calculating costs and benefits in practice is much overstated. Leaving anecdotes and shifting to broader, objective measures, consider that 97.2% of the benefits of all EPA rules stem from the $PM_{2.5}$ rule. *See* U.S. Chamber of Commerce, *Charting Federal Costs and Benefits*, at Figure 8 (2014), *available at* https://www.uschamber.com/sites/default/files/021615_fed_regs_costs_benefits_2014reportrevise_jrp_fin_1.pdf (last visited Nov. 1, 2015).

Second, H.R. 3438 holds up only rules that generate actual judicial challenges. And it is not easy to mount a challenge to a major rulemaking. Such challenges are expensive. And given all of the deference doctrines that can come into play both on

[7] *See* House Energy & Commerce Committee, *EPA's List of Billion-Dollar Rules Long and Growing*, Press Release (July 10, 2013), *available at* http://energycommerce.house.gov/press-release/epas-list-billion-dollar-rules-long-and-growing (last visited Nov. 1, 2015) (listing nine final rules and, at that point, 4-6 other rules in the pipeline that were expected to exceed $1 billion in costs); *see also* James L. Gattuso & Diane Katz, *Red Tape Rising: Six Years of Escalating Regulation Under Obama*, (May 11, 2015), *available at* http://www.heritage.org/~/media/infographics/2015/05/b3015/bg-red-tape-rising-2015-chart-1-825.ashx (last visited Nov. 1, 2015) (noting that the first six years of the Obama Administration issued twice as many "major regulations," *i.e.*, those costing $100 million or more, as the Bush 43 Administration did during its first six years).

legal questions (see the discussion above of H.R. 2631) ***and on questions of fact***, such challenges are not mounted frivolously. It does not seem too high a price to pay for monumental rulemaking challenges, where the amounts of money at stake are staggering, for agencies to face a waiting period until judicial review can be completed. Numerous challenges are not pursued when I explain to prospective clients that the prospects of obtaining stays, even of highly significant rules, is quite low. This is because they know that they will have to begin complying before they will learn whether they win a court case or not. Since the capital expenditures involved in compliance can be enormous and will be sunk costs, this often precludes challenges that should be made. Agencies should not be able to exploit such risks. In my experience, they have become prone to do so by issuing lots of rules at the same time knowing either that (a) any interim compliance they achieve advances their objectives, even if they lose litigation; and (b) industry cannot challenge every potential rule they face.

Third, any rule that is truly needed on an urgent basis could be adopted by Congress in the form of direct legislation. H.R. 3438 would have no impact at all on that congressional power. Yet it is precisely because the regulations and regulatory policies being pursued are often highly contestable and contested, that the proponents of the regulatory state and its growth do not wish to see major regulations subjected to the democratic process of legislative debate and analysis.

Turning to how the bill might be improved, I reiterate that H.R. 3438 could be adopted as written. It is an important step in the right direction. But, as contrasted with H.R. 2631, there are several ways in which H.R. 3438 might be improved. Please consider the following suggestions in that regard:

First, Congress may wish to consider a lower threshold than $1 billion in costs. The $1 billion definitely has the effect of focusing on most rules that would cry out for an automatic legislative stay. But note that the impact of a rule on the national economy can vary based on variables other than aggregate costs alone. Other variables include how concentrated or diffuse such cost impacts will be. A rule of $500 million or even $250 million imposed predominantly on small businesses could be crippling, and perhaps even more crippling than a $1 billion rule imposed on a large grouping of multiple national industries. Note that economic incidence analysis is also relevant. If demand is relatively inelastic, then a higher share of newly imposed regulatory costs can be passed on to consumers (though this can create its own problems for American families, of course), whereas if demand is elastic, then manufacturers will bear the brunt of regulatory costs and thus impacts on the regulated industry can turn out to be more troubling. Lowering the threshold would help to pick up more rules where factors such as the concentration of costs and cost incidence would warrant an automatic stay.

Second, consider extending H.R. 3438 to independent agencies. The SEC and the FCC, just to name two such bodies, clearly have the prospect to impose significant costs on the national economy. Making the trigger for application of the bill a cost calculation by the Administrator of OIRA is useful and reaches "unitary executive" agencies but they are not the entirety of what Congress should be concerned with.

Third, I am not sure that simply directing agencies to postpone the effective date of their rules pursuant to APA Section 705 will solve all controversies. Sometimes organic statutes are quite prescriptive in setting out the timetables for rules. A simple amendment to the bill to ensure that the automatic stay is intended by Congress to apply ***notwithstanding anything in an organic statute to the contrary*** would fix this issue. The idea is to get the baseline right. In general, rules surpassing the relevant threshold (whether $1 billion, $500 million, etc.) should be automatically stayed pending judicial review. And if Congress wants to relieve particular rules from the automatic stay — or wants particular new statutes to operate differently than the contemplated changes to the default provision of APA Section 705 that would impose an automatic stay — then Congress can make such particularized exceptions.

Fourth, costs are often reckoned in ranges and not as point estimates. Thus, H.R. 3438 should clarify that if any portion of a cost range exceeds the threshold (currently $1 billion), then that would trigger application of the automatic legislative stay.

Fifth, and this is more of a question. I have not engaged in a comprehensive survey but the Subcommittee may want to consider whether there are statutes that create pre-enforcement judicial review periods that exceed 60 days. The same concern could be put the other way — there are some statutes that may require seeking review within 30 days. One amendment the sponsors may wish to consider is thus to apply the automatic stay to a suit filed within the requisite time period for seeking judicial review (whatever that may be under the applicable pre-enforcement review organic statute), or 60 days if no such period is specified by other law. That way, you are sure to establish a time certain as a clear signal to regulated parties by which they must bring a case if they wish to obtain an automatic stay, but by the same token you would not be setting a different period in which a suit must be filed than would apply to the need to otherwise bring the relevant challenge. Creating divergences in jurisdictional time periods in which to sue to obtain judicial review itself vs. the APA Section 705 time period in which to bring suit to ensure triggering an automatic legislative stay would seem to just be creating a trap for the unwary. Though I note that concern is mitigated by the fact that H.R. 3438 would only apply to large rulemakings, which would tend to ensure that counsel for the petitioners are more likely to be skilled enough to avoid such pitfalls.

I sincerely thank the Subcommittee for the opportunity to testify today.

Mr. MARINO. Professor Buzbee.

TESTIMONY OF WILLIAM W. BUZBEE, PROFESSOR OF LAW, GEORGETOWN UNIVERSITY LAW CENTER

Mr. BUZBEE. Chairman Marino, Ranking Member Johnson, and Members of the Subcommittee, thank you for the opportunity to discuss my views of bills under consideration.

And is this working okay?

Mr. CLARK. Yes.

Mr. BUZBEE. Okay. H.R. 2631, as indicated by the opening statements, would require agencies to engage in notice-and-comment rulemaking before they could revise longstanding rules, interpretive rules, and, I think clearly, as everyone has indicated, this relates to the Supreme Court's Perez decision.

And I think, furthermore, these statements of the witnesses, indicate clearly, this is motivated by concerns with excessive regulatory power. But a few things are neglected: First, most interpretive rules are issued at the behest of businesses seeking consistency and clarity in the law. And I think that this proposal is a bad idea, especially for businesses, and I also think it would predictably backfire by creating incentives for behavior that nobody here would like.

Okay. First, there's an important problem with this bill, which is the very definition of interpretive rules. Interpretive rules are not defined in the APA, and there are a wide array of rule-like documents that agencies issue that could be called interpretive rules but also might not be. If a bill like this is to proceed, we really need to have a clear definition of interpretive rules and what do not count as interpretive rules.

Second, interpretive rules address a pervasive problem and legal challenge. There's a lot of work for lawyers because statutes and regulations leave difficult questions, and businesses seek clarity and they seek certainty. So they ask questions, and ask agencies to commit and to give some kind of guidance, and agencies often will do so.

However, if you require all longstanding interpretive rules to go through notice and comment, this will not lead to a wave of notice-and-comment proceedings; instead, interpretive rules would become rigidified, they would not be changed. Interpretive rules also would cease to be issued, or agencies would be much more likely to shift into more ad hoc modes of policy making or policy making through adjudications. This is not desirable.

Second——

Mr. JOHNSON. Pull that microphone a little closer to you.

Mr. BUZBEE. Okay. Sure. Thank you.

In addition, the Perez case, which everyone mentioned, actually made a bill like this less necessary. Although the Supreme Court struck down the Paralyzed Veterans doctrine, it included strong language about the limited legal power of interpretive rules, taking a string of mostly lower court law, and making very clear that these kind of interpretive rules are not law. They don't have the sort of powerful effect.

Similarly, Supreme Court doctrine in recent years has made clear that interpretive rules do not receive the same kind of def-

erence from the courts. Basically there is not need for this bill, and it would have bad effects that would really have the opposite effects I think people desire here.

Let me turn to H.R. 3438, the "REVIEW Act of 2015." I think this is a simple bill and I applaud its elegance, but I think it could have devastating effects on the law and also could cause massive economic, environmental, and health harms, as well as create legal uncertainty.

So first, virtually all high-stakes bills are challenged by someone. This bill would stay any bill—any regulation simply upon the filing of such a challenge. The net effect would be to put regulations in abeyance, usually for years on end, regardless of the merits or seriousness of the challenge.

Second, most bills with high-stakes regulations have their own mandatory lead time or a period where people kind of phase in a regulation. An important issue of clarity is how would the tolling or the staying of lacking the effect of a regulation apply to bills and regulations with lead time.

Third, rules of broad impact are typically addressing huge risks to the population or the environment. So what are viewed as costs here also are accompanied by costs imposed on people or things that are protected. If a regulation is stayed, those harms will continue during the pendency of any legal challenges.

Cost-benefit analysis, many people debate it, but one basic fundamental rule of cost-benefit analysis is you have to consider cost and benefits of regulation. This bill only looks at the cost side of the ledger. Justice Scalia—a friend of several members of the panel here—recently said in *Michigan v. EPA* case that, reasonable regulation requires paying attention to the advantages and disadvantages of agency decisions.

Lastly, H.R. 3438 could be seen as an indirect effort to derail bills that could not be attacked directly. If there is a direct democratically-accountable challenge to a statute or regulation based on the merits, then people will know what is at stake. To simply stay a regulation upon a challenge would have an indirect effect and would not enhance democratic accountability.

Thank you very much.

Mr. MARINO. Thank you.

[The prepared statement of Mr. Buzbee follows:]

TESTIMONY
OF
WILLIAM W. BUZBEE

PROFESSOR OF LAW
GEORGETOWN UNIVERSITY LAW CENTER

BEFORE THE SUBCOMMITTEE ON REGULATORY REFORM, COMMERCIAL AND ANTITRUST LAW
U.S. HOUSE JUDICIARY COMMITTEE
UNITED STATES HOUSE OF REPRESENTATIVES
2141 RAYBURN OFFICE BUILDING

NOVEMBER 3, 2015

HEARING ON H.R. 3438, THE "REQUIRE EVALUATION BEFORE IMPLEMENTING EXECUTIVE WISHLISTS ACT OF 2015"; AND H.R.2631, THE "REGULATORY PREDICTABILITY FOR BUSINESS GROWTH ACT OF 2015"

Chairman Marino, Ranking Member Johnson, and Members of the Committee,

I thank you for inviting me to discuss my views of the two bills under consideration, H.R. 2631 and H.R. 3438.

I am a Professor of Law at Georgetown University Law Center. I teach Administrative Law, Legislation and Regulation, Environmental Law, and advanced courses on regulation. I have also been a professor of law or visiting professor of law at Columbia Law School, Cornell Law School, Emory Law School, and University of Illinois School of Law. I have published extensively, with books published by Cambridge University Press, Cornell University Press, and Wolters Kluwer, and dozens of articles and book chapters, including articles on regulatory and administrative law issues in *Stanford Law Review*, *NYU Law Review*, *Cornell Law Review*, *Michigan Law Review*, *University of Pennsylvania Law Review*, *George Washington Law Review* and numerous other journals. Before becoming a professor, I practiced law in New York City. As a lawyer, I have represented leading corporations, government entities, and not-for-profits. I was a law clerk for United States Judge Jose A. Cabranes and am a graduate of Columbia Law School and Amherst College. I have previously testified at numerous hearings on regulatory and environmental issues before committees of both the House of Representatives and the Senate.

I am here on my own behalf and not on behalf of any organization or entity.

I. H.R. 2631

H.R. 2631, the Regulatory Predictability for Business Growth Act of 2015, would require agencies to engage in notice-and-comment rulemaking before they could revise a longstanding interpretive rule. I suspect that this bill relates to, or perhaps is motivated by, the same concerns that led to the litigation that culminated in the Supreme Court's decision earlier this year in *Perez v. Mortgage Bankers Ass'n*, 138 S.Ct. 1199 (2015). That case unanimously rejected a lower court decision and strain in law in the DC Circuit that had, in settings that were not fully defined, required agencies to go through notice and comment rulemaking if they were going to abandon or change a longstanding interpretive rule, at least where the initial interpretation had led to substantial reliance interests or investment. The *Perez* Supreme Court, however, rejected this DC Circuit innovation. Drawing heavily on precedent long established in the Supreme Court's unusually clear decision in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978), the Court in *Perez* held that the Administrative Procedure Act (APA) explicitly exempts agencies from having to engage in notice and comment procedures before "formulating, amending, or repealing" an interpretive rule. The APA similarly does not require notice and comment process for several other types of related rules such as "general statements of policy, or rules of agency organization, procedure, or practice." Courts have no power, the Supreme Court has now clearly stated in several cases, to improvise and impose additional procedural requirements not required by the APA, another statute, or the agency's own regulations.

The Supreme Court has thus clearly rejected efforts to develop judicial doctrine that would

constrain agency changes in interpretive rules. But because the *Perez* and *Vermont Yankee* decisions were statutory interpretation decisions, they do not preclude a new contrary legislative choice such as that proposed by H.R. 2631. I therefore turn now to assessment of the wisdom of this bill.

This bill is likely motivated by concerns about excessive regulatory power, perhaps influenced by critics of agency use of interpretive rules, policy statements, guidelines, and other rule-like documents that are regularly issued and utilized, yet without a preceding notice and comment process. This critical strain tends to make several claims, but as further discussed below, often fails to acknowledge that many, if not most, of such interpretations and policy statements are issued at the request of business interests seeking clarifications of government policy as well as regulatory consistency. Critics of agency use of interpretive rules and other similar guidance and policy documents often claim that agencies abuse the legal option of such rules to enhance their own power or escape accountability. Such criticisms may have a kernel of truth, or at least describe motivations behind and impacts of some interpretive rules, but certainly does not describe the usual reasons for use of such rules or establish the wisdom of requiring notice and comment rulemaking to change any longstanding interpretive rule.

The question is whether this bill's effort to impose notice and comment process across the board as a required antecedent to changing an interpretive rule that is more than a year old is necessary or a good idea. I think such a bill, on balance, would be a bad idea, especially for businesses. It also would predictably backfire, creating incentives for behavior that would be more problematic than current use of interpretive rules.

First, and very importantly, a definition of "interpretive rules" is not provided in the APA or this bill and is not clear. All agencies issue a wide array of rule-like documents that could be characterized as interpretive rules, where they provide a legal interpretation and often clarify their view of a legal issue in a particular context. The APA could be read as exempting several distinctive and different categories of rule-like documents from notice and comment process, as litigants and courts have argued and developed through case law. But the line between an "interpretive rule" and a "statement of policy" is far from clear, and agency enforcement guidelines ostensibly issued to guide agency personnel are obviously of great interest to targets of regulation and at times could be characterized as "interpretive rules." So a definition of what is covered is important. If such a bill is to clarify the law, it needs to be quite explicit about what is or is not covered and make clear the differences among these categories of rules.

Second, most interpretive rules and other related rule-like guidance or policy documents are procedurally and substantively desirable and almost inevitable. Interpretive rules address open questions or legal application uncertainties, often at the request of businesses subject to regulation. Businesses tend to prefer certainty to uncertainty, especially where the stakes are high. Notice and comment rulemaking is one option to bring clarity to the law, but that process tends to be far slower. The numerous impact statements imposed on many rules through statutes and executive orders regarding federalism, small business impacts, paperwork, and costs and benefits, to name a few, slow down many rules. Moreover, due to the more substantial

investment notice and comment rules entail, they are less likely to be adjusted and improved once promulgated. An interpretive rule, in contrast, is sought and often preferred by both the agency and businesses subject to regulation because it can be issued more easily. And if the interpretation proves to be problematic, it can be adjusted without preceding burdensome process. By imposing an across-the-board requirement that all long-enduring interpretive rules cannot be changed without notice and comment process, agencies will be discouraged from taking on the added work that change would entail. Even rules on modest issues would become rigidified. Regulatory responsiveness, which tends to be a virtue, not a vice, would be undercut.

Third, businesses may wish for a world with less regulation, but when laws and regulations do exist due to laws duly enacted by Congress, businesses want to know what is required and agencies will want their many officials to understand the law. Both agencies and businesses subject to regulation hence tend to prefer regulatory certainty and consistency to ad hoc judgments that cannot be predicted. Interpretive rules are a way to improve such agency consistency and legal predictability.

Fourth, this bill will predictably backfire. Scholars have repeatedly noted that as notice and comment rulemaking has been subjected to an increasing array of analytical hurdles imposed by other statutes and presidential executive orders, as well as often rigorous "hard look review" in the courts, the response of many agencies is to avoid making law in this increasingly burdensome and ossified manner. Similarly, telling agencies that long-lived interpretive rules can only be changed through notice and comment rulemaking will make other less procedurally onerous policymaking modalities comparatively more attractive. If interpretive rules would now be saddled with more procedural rigor, ad hoc agency policymaking or policymaking via adjudication would become relatively more appealing. This bill would create strong incentives prospectively for agencies to cease issuing interpretive rules. Either no interpretations will be offered, or they will be offered under the guise of other non-notice and comment rules recognized by the APA. The result will be less knowable and less predictable regulation.

Importantly, *Perez* arguably made a bill such as this less necessary. Although *Perez* clearly affirmed the APA's language and limited judicial procedural second guessing, it also included strong language about the limited power of interpretive rules and, it appears, other forms of law interpretation by agencies that do not go through preceding notice and comment process. Such rules do not create the uniformly binding impact of a promulgated rule placed in the Code of Federal Regulations. In contrast, a notice and comment rule, if it survives judicial challenges, is then binding on the agency, on the targets and beneficiaries of regulation, and on the courts as well. They have the force of law. Interpretive rules, in contrast, are a tentative statement of the law that are subject to ongoing contestation in the courts and subject to judicial review second guessing.

Similarly, other recent Supreme Court precedents teach agencies that they will receive less deference if they utilize an interpretive rule instead of more democratically participatory and responsive notice and comment process. Instead of the substantial deference often provided

under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), interpretive rules and other policy statements, manuals and the like usually do not have the "force of law" and will at most receive so-called "sliding scale" deference that in substantial part rests on the thoroughness and persuasiveness of the agency's views. *See United States v. Mead Corp*, 533 U.S. 218, 230 (2001); *Christensen v. Harris County*, 529 U.S. 576, 587 (2000); *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Court doctrine hence already discourages strategic use of interpretive rules, giving them less impact and resulting in less deference to agencies.

A separate issue is a body of law that has sometimes provided agency interpretations of their own rules with an especially deferential form of judicial review. A growing body of scholars, judges, and several justices have in recent years called for rejection of this doctrine, often referred to as *Auer* deference due to its articulation in *Auer v. Robbins*, 519 U.S. 452, 461 (1997). Not all interpretive rules involve this form of interpretation, but it can pose a problem. This bill, however, says nothing about this form of deference and many administrative law scholars and court watchers in any event anticipate its demise or weakening in the near future.

Rigidifying agency interpretive rules and even discouraging their use are both bad ideas, even if some agencies may at times overuse interpretive rules or change them abruptly. Current legal doctrine limits their power. In addition, most agencies use such rules for sound reasons, often at the request of businesses and to further broadly shared goals of consistent and knowable law. Agencies tend to be sensitive to the views and needs of all stakeholders subject to or protected by their regulations and interpretive rules. They also know that congressional committees watch over them. I am unaware of any empirical study documenting pervasive agency abuse of interpretive rules and their frequent unwise abrupt change preceded by no advance public vetting of such changes. An across-the- board imposition of notice and comment process for any interpretive rule that has been in existence for more than a year is an unwise and unneeded change in the law.

II. H.R. 3438

H.R. 3438 is quite simple, but could have a devastating effect on the law, while also causing massive economic and health harms and creating legal uncertainty. By its terms, this bill would stay any "high-impact rule" that "may impose an annual cost on the economy of not less than" $1 billion if challenged in court by anyone. Hence, rather than courts reviewing stay motions and later the merits of a regulation under a body of law long developed by the Supreme Court, the mere fact of a challenge would result in a stay "pending judicial review." Presumably, this means until the completion of judicial review, although it does not quite say that. This bill is a bad idea at several levels.

First, virtually all high stakes rules will be challenged by someone, so virtually all such rules under a law such as this proposal would receive new statutorily granted stays. Since such rules often now generate millions of comments and are issued with lengthy technical documents,

Federal Register preambles, and additional legal memoranda, briefing of such challenges itself takes many months, sometimes years. Then, depending on the agency and underlying statute, battles can be joined on the court appropriate for review, on the relevant standard of review, on litigants' standing and, eventually, a rule's merits. A ruling can then lead to appeals, or *en banc* review, or petitions for Supreme Court review. This all will often add up to years of litigation before challenges to a regulation result in what appears to be a final ruling. But many rules are at that point partially upheld or, even if rejected, are remanded for potential curative actions by the agency. The net result will, in reality, be that virtually all "high-impact rules" would be stayed for years, regardless of the merits of the challenges.

Second, a related concern and uncertainty is how this bill would relate to laws or regulations that, by their terms, provide substantial lead time before they become fully effective. Would these time periods be tacked on at the conclusion of years of litigation?

Third, of greater concern, rules of broad impact typically are addressing a huge risk to a population or the environment. A virtually guaranteed stay would mean that the regulated harms might go unchecked for years, potentially resulting in illnesses and deaths or environmental destruction on a huge scale. That such impacts would continue has been shown by innumerable cost-benefit analyses by agencies and the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB). US laws regulate many risks, and in our highly urbanized and industrialized society with massive and often uniform methods of production, risks and harms on a huge scale are a prevalent risk. Cost-benefit analysis is criticized by many, but one of its valuable lessons is that prudent regulation should be preceded by consideration of both the costs *and the benefits* of any regulation. An automatically stayed regulation would turn those regulatory benefits into years of ongoing harms.

Moreover, courts considering traditional motions for stays of a new regulation already provide a check on shoddy regulation and under Supreme Court doctrine must engage in a balanced examination of a rule's merits, as well as the costs and benefits of any stay.1 Courts will hear from a wide array of supporters and challengers. This bill, in contrast, would by fiat grant a stay, regardless of the stakes, the legal merits, and risks and costs of the harms that would otherwise be addressed. It is rare that even very high cost rules are not accompanied by massive, usually far higher societal and economic benefits of regulation. With this bill's automatic stay, those harms would go on for years, typically costing the country and its citizens and possibly the environment billions of dollars in harms that would usually far surpass regulatory costs.

Fourth, this bill would engender legal uncertainty on its most important trigger of applicability. What does "annual cost on the economy" mean? No reputable economist, or public health

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1 Under Supreme Court law, courts must consider "'(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.'" *Nken v. Holder*, 556 U.S. 418, 426 (2009) (quoting from *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)).

expert, or regulatory expert would ever suggest that regulations should be assessed looking only at the "cost" side of the ledger. Benefits must be assessed as well. Furthermore, many laws are meant to protect vulnerable populations or some sensitive or important amenity or the environment, meaning that their protection should be given priority due to the considered judgment of an earlier Congress that is now in duly enacted law. But this problem in not defining "cost" goes further. While it could mean costs alone—which would be odd and illogical-- it might be read to mean "net costs" derived from looking at benefits and costs. It could mean direct costs or, consistent with most calls for expanded cost-benefit analysis, it might mean "societal costs." But all learned advocates of cost-benefit analysis call for consideration of both societal costs and societal benefits, and also the net sum of the two. Or it could mean costs in the economic sense of costs imposed on the economy due to the possible drag or inefficiencies created by regulation, or what some call a "deadweight" loss. This number would likely be much smaller.

The illogic of talking about costs alone is evident if one considers a basic pollution control example. If a regulation results in one company paying for a good or service—say a pollution control strategy--and others receive that payment, there is no net societal cost unless something about the regulation results in other inefficiencies. Or, for another example, if under the just finalized Clean Power Plan power plants shift to greater reliance on natural gas or cleaner forms of energy and consumers and the environment benefit, that complex array of costs and benefits and legal priorities should all be considered by agencies and courts. To assess where the "net" falls requires one to consider all harms and benefits of the regulated activity and world with regulation, as well as consideration of whether those harms are internalized or externalized by some other regulatory strategy, common law regimes, or markets. Put simply, to consider costs alone without any consideration of benefits is illogical, contrary to any defensible form of regulatory analysis, and would lead to ongoing massive harms that could swamp regulatory burdens.

Finally, a bill like H.R. 3438 could be seen as an indirect legislative effort to defeat regulations or render laws a partial nullity when more direct and democratically accountable legislative action would fail. Under the guise of giving courts a chance to review challenges, laws would be nullified for years even where the courts and Congress have clearly required an agency to undertake the regulatory action and even in settings where the regulation might be rock solid. A body of scholarship and court doctrine criticizes such indirect legislative strategies due to their lack of democratic accountability. Through vague or indirect language or procedures, here an automatic stay mandate, such bills try to achieve ends that would fail if sought through direct and open congressional efforts to amend the underlying statute. Similarly, stealth appropriations riders that seek to change substantive laws or create selective legal carve-outs have long been criticized due to their lack of transparency and democratic unaccountability. If the Constitution's democratically accountable legislative process could not be surmounted to amend the law underlying a high-impact regulation, and if a regulatory stakeholder could not succeed in the lengthy regulatory process with arguments rooted in law and science, then Congress should not empower a single litigant to achieve the same impact by merely filing a lawsuit. Such a legislative end-run would undercut the Constitution's legislative process, derail duly enacted

laws, ignore the legal and factual merits of the underlying regulation, and disrespect courts that have long applied a nuanced body of law to assess requests for stays of a challenged regulation.

Conclusion

Both bills may spring out of concerns with particular regulations or Supreme Court decisions, but both could cause serious long-term harms to well-established administrative law doctrines. Moreover, any bill that imposes a stay on any high-impact rule threatens to bless years of ongoing harms, illness and deaths. Sometimes stays will be well deserved, but it is far better for courts to engage in an informed and balanced assessment of the merits of the challenge and regulatory costs and benefits than for Congress to pass a law that would make such stays automatic upon the filing of any legal challenge.

Mr. MARINO. We will now begin our 5 minutes each of questioning, and I will recognize myself to start the process.

Mr. Clark, you suggested that judicial stays are hard to come by, even of high-cost rules, and that they may be getting even harder to come by. Could you provide me with more details about how hard it is and the trend that has been set?

Mr. CLARK. Sure, Your Honor. Sure. I'm sorry, Chairman Marino. I have an argument tomorrow in the Fifth Circuit so I'm in "Your Honor" mode. My apologies.

Mr. MARINO. Understood.

Mr. CLARK. But I would say, yes, in my experience, it's very difficult to get stays. You know, the most regularized jurisprudence in that area is from the D.C. circuit. And there really is an almost form order that they issue that's just a few paragraphs long. So it's not like, even if you're talking about a rule of Earth-shattering costs, you know, benefit implications or the ability to devastate an entire industry that you're going to get an opinion from the D.C. circuit about whether a stay will be granted or not.

Essentially, all of the balancing of the four equitable factors takes place behind closed doors, and you just get a result of really stay yes or stay no. Or if there is a stay, some kind of definition of, you know, what exactly is being stayed if it's not the entire rule.

And I think that one of the benefits of the bill that you have in front of you to do the automatic stay is that you're showing value judgment, which I think is entirely appropriate for Congress to make, that if you're talking about a rule that has enormous costs of $1 billion or more that those should essentially be not, you know—they wouldn't begin to be implemented until after the judicial review process is closed. I think that's entirely appropriate and would be an improvement over the current system.

Mr. MARINO. Thank you.

Mr. Noe, your statement talks about rules for which it would be important to have protections like those in the REVIEW Act that doesn't rise quite to the revenue act of a $1 billion threshold. What kind of refinements or alternative tests could be added to the terms already in the bill to make sure that we are covering all the rules that really need this kind of automatic stay protection?

Mr. NOE. Well, one suggestion that I would make, Mr. Chairman, is to focus not on the annual cost but the total capital cost. As I understand the bill, a large part of the driver here is to avoid some capital in complying with a rule that is then determined to be unlawful.

And if you key it to total capital costs of not less than $1 billion, you would have captured the Boiler MACT rules I referred to. They had a capital cost of over $1.7 billion. But annualized over a 20-year period, as EPA does, they were estimated to be $860 million annually. So it would not have passed that test.

One other suggestion I would make is to clarify that the cost includes both direct and indirect costs, because agencies sometimes say, well, it's not this, you know, national ambient air quality standard that caused the cost; it's implementation of it. And so direct and indirect cost, I think, would be helpful to capture that as well. But I'd be happy to work with your counsel on some specific language.

Mr. MARINO. Thank you.

Mr. Brady, you alluded in your statement from your experience what regulation has done to the construction business. Could you elaborate on what you've experienced because of the regulation?

Mr. BRADY. A couple things. Thank you, Mr. Chairman. The regulation and changes in regulation are uncertainties in small business. Many of you probably have experience in small business, and any uncertainties is very difficult for a small business to perpetuate itself, whether there's jobs on the line or the regulation adds additional costs in the middle of a project or something like that is catastrophic to the small business.

As an example, most recently, the DOL suggested the overtime, the new overtime rule. I have superintendents, and as I said in my statement, over 100,000 superintendents in our industry would be affected by that. And so I have to go back in my office and say, is it better for me to hire and keep that person on payroll or go into a subcontract position or a contract position?

My superintendents have flexibility. They're salaried. They have flexibility on the workday. Many times they work during the weekends to get projects done, but they have flexibility to go take their kids to school or pick their kids up from the doctor or whatever the case may be. And, in fact, I think that employee would be hindered by that type of regulation, and certainly my business would be hindered.

Mr. MARINO. Thank you, sir. My time has expired, and I now recognize the gentleman from Georgia, the Ranking Member, Mr. Johnson.

Mr. JOHNSON. Thank you. And thank you all, gentlemen, for being here today. And welcome, wife and daughter.

H.R. 3438 defines a high-impact rule as any rule that the administrator of the Office of Information and Regulatory Affairs determines may impose an annual cost on the economy of more than $1 billion. This determination requires only a cost assessment and not an assessment of the money saved or the benefits of a rule; is that not correct, Mr. Clark?

Mr. CLARK. That's correct.

Mr. JOHNSON. And so is it your opinion that agencies should only consider the cost and ignore the benefits when assessing the value of new regulations, Mr. Clark?

Mr. CLARK. No, Representative Johnson. I think that agencies should do an analysis of both costs and benefits, although the issue of whether they do that or not depends in part first on whether the organic statute permits them to do that or not. But typically if the organic statute is silent on that issue, then they would need to do an analysis of both cost and benefits. Here——

Mr. JOHNSON. Well, H.R. 3438 would abandon any obligation to look at benefits and just simply impose the responsibility of determining whether or not the costs exceeds $1 billion. And if it does, then the law would require upon filing of a lawsuit within the 60-day period after adoption that the rule be stayed.

Mr. CLARK. So in response to that, I think I'd like to make two points: First is, it's not accurate that it would remove a consideration of benefits. That would remain part of the judicial review process.

Mr. JOHNSON. Well, not a part of the administrative process in issuing a stay automatically upon filing of a lawsuit.

Mr. CLARK. Right. As a matter of the stay, it would focus only on costs. I would submit to you that I think that's an appropriate thing for Congress to do, one because——

Mr. JOHNSON. Let me ask you this: Let me ask you this, if that law, if H.R. 3438 had been in effect at the time the National Highway Traffic Safety Administration issued the rule requiring air bags in automobiles, then there would have been an automatic stay applied to the adoption of that rule once the auto manufacturers filed a lawsuit. Correct?

Mr. CLARK. I don't know exactly what the cost impact of that would have been and——

Mr. JOHNSON. Assuming that it would've had a $1 billion cost.

Mr. CLARK. For the sake of argument, grant that that was true, what I was about to say based on your prior question was that one of the other constitutional values I think, that this automatic stay serves are the kinds of values that go to the vesting clause, the fact that you are the law makers and not the agency.

Mr. JOHNSON. Well, certainly. Certainly.

Mr. CLARK. So all that this does is reinforce essentially kind of nondelegation values.

Mr. JOHNSON. Well, what this does is puts adoption of a rule into the purview of whatever the opposing party of the rule decides, whether or not to file a lawsuit or not. I mean, it would just automatically stay adoption of the rule.

Now, Professor Buzbee, what is your assessment of what we have just heard from Mr. Clark?

Mr. BUZBEE. Well, I agree with your view that, a regulation needs to be assessed for both the cost and the benefits, and having an asymmetrical examination only if costs with an automatic stay basically doesn't follow the basic sound views about cost-benefit analysis——

Mr. JOHNSON. And that's exactly what H.R. 3438 does, does it not?

Mr. BUZBEE. Yes, it does.

Mr. JOHNSON. And with respect to H.R. 2631, isn't it a fact, Professor Buzbee, that parties are not bound by interpretation of agency rule. There's no binding legal effect on parties; isn't that correct?

Mr. BUZBEE. That is correct.

Mr. JOHNSON. With that, I'll yield back.

Mr. MARINO. Thank you.

The Chair recognizes the gentleman from California, Congressman Issa.

Mr. ISSA. Thank you.

Mr. JOHNSON. Mr. Chairman, if I might——

Mr. MARINO. Just a moment.

Mr. JOHNSON. Mr. Chairman, if I might, I do have some statements for the record: One is Ranking Member Conyers' statement, his opening statement.

[The prepared statement of Mr. Conyers follows:]

Statement of the Honorable John Conyers Jr. for the Hearing on H.R. 3438, the "Require Evaluation before Implementing Executive Wishlists Act of 2015," and H.R.2631, the "Regulatory Predictability for Business Growth Act of 2015," Before the Subcommittee on Regulatory Reform, Commercial and Antitrust Law

Tuesday, November 3, 2015, at 10:00 a.m.
2141 Rayburn House Office Building

Today's hearing offers an opportunity to consider whether two regulatory reform proposals – H.R. 3438, the "Require Evaluation before Implementing Executive Wishlists Act of 2015," and H.R.2631, the "Regulatory Predictability for Business Growth Act of 2015" – achieve the proper balance between streamlining the administrative rulemaking process and ensuring that process is accountable, efficient, and fair.

Unfortunately, both of these bills fail to strike that right balance.

Beginning with H.R. 3438, I note that this bill would stay the enforcement of *any* rule imposing an annual cost on the economy in excess of $1 billion pending judicial review.

Notwithstanding the bill's colorful short title, H.R. 3438 would have a pernicious impact on rulemaking and the ability of agencies to respond to critical health and safety issues.

In essence, the bill would encourage *anyone* who wants to delay a significant rule from going into effect by simply seeking judicial review of the rule.

We all know that the judicial review process can take months, if not years to finalize, especially if the appellate process reaches the United States Supreme Court.

Thus, rather than ensuring predictability and streamlining the rulemaking process, this bill would have a completely opposite impact by making the process *less* predictable and *more* time-consuming.

Most importantly, H.R. 3438 has *absolutely no health or safety emergency exceptions.* If anything, this bill would empower the very entities that caused a serious health or safety risk to delay – and possibly derail – legitimate efforts by regulatory agencies to respond to such threats.

And, as with other bills proposed by my colleagues on the other side of the aisle, this legislation myopically focuses only on the cost of a proposed rule, while ignoring the rule's benefits, which can often exceed its cost by many multiples.

As to H.R. 2631, the proponents of this legislation effectively seek to overrule a recent Supreme Court case regarding interpretive rulemakings.

Earlier this year, the Supreme Court held in Perez v. Mortgage Bankers Association that the Administrative Procedure Act explicitly exempts agencies from having to engage in notice and comment procedures before issuing an interpretive rule.

H.R. 2631 would amend the Administrative Procedure Act to require an interpretive rule that revises an agency's "longstanding interpretive rule" to be subject to notice and comment.

Several problems are presented by this legislation. First, it fails to define what constitutes an "interpretive rule," a subject matter that has vexed the courts for many years.

Second, rather enhancing the transparency of agency directives and public guidance, this bill – like H.R. 3438 – would also have the opposite effect. Agencies, in order to avoid the bill's notice and comment requirements, would simply regulate without providing transparency.

Remember, interpretive rules are made public and thereby serve an important informative purpose. H.R. 2631, however, would chill an agency's incentive to provide that guidance publically.

And, contrary to the bill's short title, H.R. 2631 would result in less regulatory predictability.

For example, the Internal Revenue Service implements numerous interpretive rules that taxpayers rely on in assessing their tax obligations. This bill would undermine that agency's ability to provide that essential guidance, leaving all taxpayers in the dark.

In closing, there is broad agreement among experts in the administrative law field that our nation's regulatory system is already too ossified.

In addition to the APA's procedural mechanisms designed to ensure an open and fair rulemaking system, Congress has already enacted numerous federal laws that impose additional rulemaking requirements, while executive orders adopted over the past several decades have created additional layers of analytical and procedural requirements.

The result of this dense web of existing requirements is a complex, time-consuming rulemaking process.

In response to the explosion of analytical requirements imposed on the rulemaking process, the American Bar Association, as well as many administrative law experts, have urged Congress to exercise restraint and assess the usefulness of existing requirements before considering sweeping legislation.

Imposing new analytical and procedural requirements on the administrative system also carries real human and economic costs.

As Robert Weissman, the President of Public Citizen, observes, the cost of regulatory delay is "far more severe than a generic inefficiency. Lengthy delay costs money and lives; it permits ongoing ecological destruction and the infliction of needless injury; and it enables fraudsters and wrongdoers to perpetuate their misdeeds."

With those observations, I look forward to hearing from today's witnesses.

Mr. JOHNSON. Also, a statement from William Funk, Louis and Clark Law School; also a statement from the NAACP calling on EPA to set a strong final ozone standard highlighting disparities and health impacts from air pollution. And also a letter from 40 health labor faith-based environmental justice and frontline community organizations calling on the EPA to set a strong final ozone standard; also a letter from 16 public health and medical organizations opposing any attempts to block, weaken, or delay Clean Air Act protections; and last but not least, an article in The Hill entitled "Arguing About the Cost of Regulation But Ignoring the Benefits," by Stewart Shapiro. I would ask that these be placed into the record by unanimous consent.*

Mr. MARINO. Without objection.

Now Mr. Issa.

Mr. ISSA. Thank you. That was well worthwhile.

And following on Ranking Member Johnson's line of questioning, I think it was a good line of questioning, but I'd like to take it in a slightly different way. And I'll go down with a question for everyone.

Mr. Buzbee, do you think that there's anything wrong today with the current situation in which a $1 billion or greater cost to the private sector can be passed on by an agency years, even decades, after the passage of a law by Congress and, in fact, you must effectively do it or be in peril until or unless you prevail in court, perhaps for 5 years later? Just a yes or no. Do you think that that status quo today is okay?

Mr. BUZBEE. Well, I think that the supposition that there isn't an opportunity for a stay before the courts is not correct. The courts will——

Mr. ISSA. No. Well, you have to go to the court and get a stay.

Mr. BUZBEE. That's correct.

Mr. ISSA. Very few agencies think that their new rules are frivolous enough for them to grant the stay. So by definition, you have to go to the court which means you have a period of time and a high standard. Just yes or no, do you think that's a good standard today?

Mr. BUZBEE. Well, I think many agencies actually add lead time——

Mr. ISSA. Professor, I want to know if you think the current standard, not what benevolent government bureaucrats do, you know. I'm not from the side of the aisle that believes in benevolent government bureaucrats. So excluding all the good things that sometimes happen, do you think the current balance of what can happen is okay? Yes or no, please.

Mr. BUZBEE. I believe the administrative law doctrine is quite sound in this area.

Mr. ISSA. Thank you.

Mr. Clark, I would go down and just say, how would you answer that yes-or-no question?

Mr. CLARK. I think, Representative Issa, that that's an intolerable status quo.

***Note:** The material submitted by Mr. Johnson is not printed in this hearing record but is on file with the Subcommittee, and can be accessed at:

http://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=104126.

And if I could just supplement a little bit to the answer I wanted to give to Representative Johnson——

Mr. ISSA. You can in a second. Let me just get down this and then I'll get back to you.

Mr. NOE. Congressman, I think the status quo is very problematic as well.

Mr. ISSA. Mr. Brady, you are living under these laws. I assume your answer is you don't think the status quo is particularly good.

Mr. BRADY. Status quo is not good for small business.

Mr. ISSA. Okay. So 75 percent of the audience here today says that they want to rebalance this.

Now, the act moves the burden, if in a sense, the other direction, doesn't it, in the case of multibillion. And agencies, including ones that my former Committee next door looked at, often underestimate. So a multibillion dollar one effecting dust for farmers and so, can sometimes be guessed at a very low level and thus circumvent the $1 billion responsibilities.

Mr. Clark, you're familiar with some of those cases where they guess low?

Mr. CLARK. Yes. Or the cost-benefit analysis, in my view, sometimes is often deliberately skewed.

Mr. ISSA. So as we look at this legislation, I'm going to ask you a series of—one question. I'm going to get back to Mr. Clark, give you that opportunity to follow up.

But as we look at the rebalancing, isn't the obligation of this Committee, recognizing we're only dealing with regulations that come out that essentially are adding to a law that is more than a year old, a new regulation in which they did not do it in the original passage of law—I think it's important, that limitation. We're not dealing with the act of Congress and then the rulemaking afterwards. We're dealing with second guessing and new thoughts on legislation that could be decades old.

Should we consider for a smaller than $1 billion still having an expedited ability to get to the court for that decision, and if so, should we consider that the court instead of having the burden be irreparable harm have a simple balance of cost and benefit?

And I ask that for a reason, because if it's $100 million and on balance it costs more than it saves, it may not be irreparable harm. But as was said by the Chairman in the opening statement, currently, just having it cost you a lot of money and doing very little benefit doesn't happen to be a standard that the court would consider. So as much as I like the billion, I like the shifting.

My question to you, and I'll start with Mr. Clark is, should we consider a balance that puts the court in an expeditious fashion in a position to evaluate sooner and on an expeditious basis, even if it's below $1 billion? Mr. Clark.

Mr. CLARK. I think expedition would be helpful. Although I would say that since a lot of these rules go to the D.C. circuit, it's not as if their caseload is particularly high. And then I'd also say that——

Mr. ISSA. I don't believe it—they're still working on fast and furious from 2010.

Mr. CLARK. True enough.

Mr. ISSA. Mr. Noe.

Mr. NOE. I like the idea, Congressman, and I'm happy to welcome Professor Buzbee to the regulatory reform movement. It sounds like he likes cost-benefit analysis, and I would encourage Congress to require that by statute.

Mr. ISSA. As do I.

Mr. Brady, you have to live under these laws, regulations that agencies come up with years after laws are passed. How do you feel about them?

Mr. BRADY. Well, you're exactly right. And the one case that I quoted earlier is the Department of Labor on the overtime. They scored it at a $200 million impact cost. That was a direct administrative cost. They didn't take into effect the cost that an employer pays the employee, which is well over $1 billion. So yes, we would support—this is a great first step, but we would support looking at that cost-benefit analysis even under $1 billion.

Mr. ISSA. Mr. Chairman, I think Mr. Buzbee wanted to weigh in, and I don't want to cut him off unfairly. But Thank you, Mr. Chairman.

Mr. MARINO. Go ahead, Mr. Buzbee.

Mr. BUZBEE. No, thank you.

Mr. MARINO. No? All right.

The Chair now recognizes the gentleman from New York, Congressman Jeffries.

Mr. JEFFRIES. Thank you, Mr. Chairman. And I want to thank the witnesses for their presence here today, their testimony.

Let me just start with Mr. Buzbee. Am I correct that most interpretive rules are promulgated most often at the request of the industry?

Mr. BUZBEE. Yes, that is correct.

Mr. JEFFRIES. And these requests are generally made to address regulatory uncertainties; is that correct?

Mr. BUZBEE. That's correct, it's both to address regulatory uncertainty and then, agencies also usually desire to have consistency and implementation and enforcement and, hence, both business and agency see benefits to clarity in their interpretive rules.

Mr. JEFFRIES. So what would the risk be, if any, if we were to move forward and subject revisions to the interpretive rules related to notice-and-comment rulemaking?

Mr. BUZBEE. I think the most predictable effect is the backfiring I talked about. If you add process, impose new process on agencies, you know, examination of past, similar proposals so that agencies will avoid that additional process, so instead of having lots more notice and common rulemaking, you probably have fewer of these clarifying interpretive rules and more policymaking through adjudications and more ad hoc conversations.

Mr. JEFFRIES. And what, if any, benefits are there as it relates to interpretive rules for both agencies, but more significantly to industries that they regulate?

Mr. BUZBEE. In my experience, both as a professor and then also when I was advising the industry, is there's great difficulty getting, figuring out the answer to particular questions, so typically agencies seek—sorry. Businesses seek more guidance, not less, and they really would like to have agencies say what they wanted.

I was at a proceeding years ago, and a home builder said, I don't care what the rules are. I want to know what the rules are, and if I can know what the rules are, then I can comply. And interpretive rules tend to bring that sort of clarity, and that's the idea behind them.

Mr. JEFFRIES. Now, Mr. Brady, you mentioned that, I think, uncertainty is catastrophic to a small business; is that correct?

Mr. BRADY. Yes.

Mr. JEFFRIES. And would you say that there's uncertainty as it relates to the period of time in early 2013 as to whether we were going to fall over the fiscal cliff or not? Is that uncertainty that was——

Mr. BRADY. There was a lot of uncertainty.

Mr. JEFFRIES. And would you say there was uncertainty as relates to the impact of the sequestration cuts that have been imposed upon this country as a result of a deal that was struck several years ago that creates a climate that could be adverse to small businesses in America?

Mr. BRADY. In regards to the sequester?

Mr. JEFFRIES. Yes.

Mr. BRADY. Potentially, yes.

Mr. JEFFRIES. When the government shut down in October of 2013, which I believe it was 16 days, it cost the economy about $24 billion in lost economic productivity, was there uncertainty as to the chaos that was imposed upon us as a result of this addiction with the Affordable Care Act repeal? Was that uncertainty problematic in terms of the government shutdown?

Mr. BRADY. Yes.

Mr. JEFFRIES. And we've been engaged in this process of serial flirtation with defaulting on our debt, which would be the first time that we would default in our Nation's history were that to happen, even though we're charged constitutionally with protecting the full, faith, and credit of America. Does the serial flirtation with not raising the debt ceiling and defaulting on our debt, aside from the catastrophic economic consequences that would be caused, does that create a level of uncertainty that is problematic for small businesses across America?

Mr. BRADY. We are a little over my pay grade on the debt limit, but I must——

Mr. JEFFRIES. I think that's the easiest question of all.

Mr. BRADY. But I must answer the interpretive—there's uncertainty in interpretive rules. And for 29 years we worked under interpretive rules. Those interpretations can change from Administration to Administration, and that's the uncertainty with an interpretive rule that hasn't gone through the rulemaking process, there's uncertainty.

Mr. JEFFRIES. Now Professor Buzbee, you mentioned that H.R. 3438 would cause legal uncertainty. Can you just elaborate on that dynamic and why that would be problematic for the industries that are seeking relief from regulation?

Mr. BUZBEE. Well, one important aspect is by not defining what counts as cost. If this became law, there's a lot of different ways you can define cost. Some people call for cost-effective regulation. Virtually everyone says that if you're going to be cost-benefit anal-

ysis, you don't just look at direct effects, you look at all of societal costs and benefits. Mr. Noe, years ago worked on the idea that you should look at all societal costs and benefits and then look at the net of them to figure out if regulation is a good idea. This bill, by saying you stay any regulation by just looking at costs might stay a regulation that might be incredibly important and leave people very vulnerable.

Mr. JEFFRIES. Thank you, Mr. Chairman. I yield back.

Mr. MARINO. Thank you. The Chair now recognizes the gentleman from Michigan, Congressman Bishop.

Mr. BISHOP. Thank you, Mr. Chairman. And thank you to the panel for being here today, and I appreciate your testimony.

I'd like to begin, if I could, with Mr. Clark. Critics of the REVIEW Act say that it will stop urgent rules in their tracks. Professor Buzbee indicated that that added process might discourage rulemakers also. But in your written testimony, I thought you provided the perfect answer for that, that statement, when you indicated that if a legislative rule—if a rule was that important, that Congress should take initiative and pass the statute as provided in our constitutional duty. I just want you, if you wouldn't mind, to expound upon that. And doesn't your answer highlight how upside down our modern concept of how to legislate and how the process works? And it seems to me that—of course, I'm new here, so I'm learning as I go, but as I sit through these hearings, I note that the power of Congress has slowly been handed over to unaccountable bodies, and we in Congress have very little authority to step in.

And I listened to the questioning earlier from my colleague across the aisle, who suggested that all these other uncertainties, when he's talking to Mr. Brady out there, that were caused by Congress. Certainly, there are uncertainties, but at the same time Congress is accountable. Ultimately, we have to face the people that brought us—that sent us here. Agencies don't have that same accountability.

So I would like you to talk a little bit about that answer. And if you wouldn't mind, just expound upon your thought on the current state of our system.

Mr. CLARK. Yes. Thank you, Representative Bishop. I agree with all of those remarks. And I think it's precisely true. If you're talking about a monumental regulation that would impose more than a billion dollars of costs, to essentially, you know, say if that truly is seen as something that's urgent, you must have whatever the health and safety benefits or other benefits of the rule are, that the easy answer to any objection like that is for Congress to pass that law, that is clearly more legitimate under our constitutional system than to have it be done by a delegated power.

And this allows me I think, to provide the rest of the answer to Representative Johnson, which is, it's not unfair to have an asymmetric consideration of costs here, because all you are doing as Representative Issa recognized, is flipping the burden of proof. And I think you're flipping the burden of proof to be more in the constitutional direction. If a rule imposed more than a billion dollars in costs, make the regulators—don't presume that they are correct in their cost benefit analysis. Make them prove that the benefits

exceed the costs through the judicial process, and don't let a rule like that go into effect until the judiciary has agreed, as an independent check on that delegated power with the agency imposing a rule of that magnitude.

Mr. BISHOP. Thank you very much.

I think, if I could, also to turn to Mr. Brady. And I want to thank you for being here. And thank you for representing small business, because I know that small business is really the most impacted by this increased regulation and this regulatory environment.

In your testimony, you stated that for 29 years the EPA used various interpretive rules in lieu of going through the rulemaking process for the Clean Water Act. And we hear, in our districts, all about that process, especially with regard to the Clean Water Act. And I'm wondering if, after all this, did that period offer any clarity or certainty in your industry?

Mr. BRADY. The interpretive rules?

Mr. BISHOP. Yes.

Mr. BRADY. Well, it produces clarity at the moment. What it also produces uncertainty as to where it's moving. I mean, the Supreme Court issued two rulings on interpretive rules, on the Clean Water Act, and yet, those interpretive rules were not substantially changed according to the Supreme Court's rules. And there was no public hearing, no requirement to create or give input from the public as the EPA is supposed to do. And so those regulations, interpretive, do not necessarily create the clarity long term that a business needs.

I will also say that one shoe doesn't fit all. And as somebody suggested earlier, interpretive rules are based on industry asking questions for clarity, and that may be clarity to a large business, but not a small business.

Mr. BISHOP. Thank you, sir. And I yield back.

Mr. MARINO. Thank you. The Chair now recognizes the gentleman from California, Congressman Peters.

Mr. PETERS. Thank you, Mr. Chairman. My colleagues know that I practiced law in this field before I got into government, and so I'm pretty sympathetic with some of the stuff that you are talking about.

And, Mr. Brady, I want to ask you a question, couple of questions, just to make sure I understand what the objection is.

You gave an example about overtime rules that might take effect for a business who's maybe already into a project, and so I understand the problem is the law or the courts. And you couldn't recover those. Obviously, if you were forced to pay these wages because a new rule came into effect, you were to pursue, overturn the rule, you would still be out the money. Would that not be irreparable harm under the law, and you are just not getting an injunction from the court?

Mr. BRADY. I think that it would be irreparable harm, but that is a very tough thing to prove and a very tough thing for a small business to get a stay based on that.

Mr. PETERS. Right. But I'm thinking that maybe the objection is more that the courts are not doing their jobs under the current standard by recognizing, this is irreparable harm; this is money I can't get back, might be a lot of money. In this micro level, forget

about the billion dollars, it's irreparable harm to that business. And I would say that I would agree with that, but the problem is maybe the courts aren't observing that.

Mr. BRADY. Well, from the law perspective, I don't mean to speak from an expert position, but, again, you're right, the courts have not been willing to issue those stays——

Mr. PETERS. Okay.

Mr. BRADY [continuing]. When we argue irreparable harm.

Mr. PETERS. Okay. The other thing is you talked about the idea of a law coming into effect while a project was going on. Has there ever been an attempt to grandfather projects that are, say, permitted or under construction so that they are not subject to new regulations, and is that something that you think would be constructive?

Mr. BRADY. It could be constructive, but this law, the overtime law, is indexed every year per the law. So that means that we have to change those—we don't know what that index is until January 1st.

Mr. PETERS. Well, in this particular case, there would be—that wouldn't be applicable. But I guess the question you raised in my mind was whether, you know, you're doing a project and all of a sudden the law changes, maybe the project would be protected from that through the duration of the permitting?

Mr. BRADY. On a long-term project, that may be able to be——

Mr. PETERS. That's not the issue.

Mr. BRADY. But from a short-term perspective, there's still that uncertainty as to what you are dealing with. And whether or not that person is an employee still, versus a contract person.

Mr. PETERS. Right.

Mr. Noe, I wanted you to give you a chance to respond to Professor Buzbee. So with respect to these letters that you get from an agency, it was often my experience that you desperately wanted the agency to tell you what they meant by this, how they were going to treat it so you can count on it. And I understand the frustration you state of, you know, you have been relying on a particular interpretation for many years, all of a sudden the agency changes it, and that's got to stink. I get that.

But on the other side, how do you deal with the fact that you might further bureaucratize this process by telling them that if you do give us an answer to this question, we might sue you? And the thing we talk a lot about here is empowering people to make decisions. And it seems to me—so I would just like you to sort of respond to the professor about how that would be——

Mr. NOE. Yes. Thank you for that question, Congressman. And I would say that of the witnesses here who work in the business community, we all support these bills. And the reason is, yes, we want clarity; yes, we do ask agencies for interpretations, but we also want due process. And I think that's what the bill would provide.

We also find it very hard to operate in a regulatory system where there's actually now an incentive and agencies are going in this direction to hollow out their legislative rules. A lot of the controversial issues are not in those rules. They pass through a one view review. You don't have an objection here, because once they're object

to and along comes an interpretive rule, without due process, without notice and comment, and then they can do a 180 and say one day our policy was X, and the next day it's not X.

I can give you a specific example where you can imagine an agency issuing a broadly-worded legislative rule with a preamble that says, what we mean is X. They could come out, under mortgage bankers, later with a letter or something that says not X.

Mr. PETERS. I actually think we—I agree on the phenomenon, and I actually have a lot of examples that I get steamed about where the government gets away from what Congress intended, the government actually is fighting with its own citizens of its own businesses. It drives me crazy.

I just want to—I have 14 seconds left, so I won't be able to talk about it now. But I would love to talk to you more about how to preserve the flexibility, to answer a small business's question about what the heck am I supposed to do, because that's often how it comes up, without doing this thing that you describe, which is to really—to be unfair, to be inconsistent with the law, which is something that deserves a remedy. I just don't think we've landed the plane on that yet and I would like to talk about it more.

Mr. Chairman my time has expired.

Mr. MARINO. The Chair now recognizes the gentleman from Georgia, Congressman Collins.

Mr. COLLINS. Thank you, Mr. Chairman.

Again, this is—and I go out to both Mr. Bishop and also Mr. Peters in his question. I think this is a problem that most people are just struggling. Mr. Brady, that's why in a panel like this I appreciate you being here and actually having the, you know, what I call the boots on the ground. You have to live with this all the time.

I've had in my office just recently—it's not just a matter of also the interpretive language, it's also the matter of getting the actual agencies, if they are going to do a rule to actually do the rule. And I've got businesses right now that are having to make multi-million dollar decisions based on the salt or lack of salt in processed foods that are going to school lunch programs. They are having to make the decision now, because actually, business understands that you actually have to plant your crop before you get a harvest. Government doesn't understand that.

Government, if you work in the little cubicles down, which God love them, they are great folks, they need to be smaller in size, but they work down here for the good of folks, that's not the way it happens. They just can go on because they are never held accountable to any standard. They are accountable to a piece of paper that's brought out at the end of the day.

Mr. Buzbee, you said something that is really interesting to me. How in the world—and again, you have to understand, if you've heard me on the floor, and you've heard me here, I am not at all concerned about imposing a little bit of work on an agency. That is not a problem. Okay. My problem is when you said to impose due process or a substance, actually would be a problem, because then they would begin to skirt. I want you to explain a little bit more what you were saying there?

Mr. BUZBEE. Sure.

Mr. COLLINS. Because that right there is just terrible.

Mr. BUZBEE. Sure. I would be happy to. Supreme Court doctrine going back, actually, 1940's and 1950's which make clear, agencies can make policies in several different modes and Administrative Procedure Act has also long recognized that. And so when you add a regulatory burden on one of the options here, interpretive rules, agencies will look at the other options they have. And one of the options agencies have is to do things in a more ad hoc basis, or possibly, other the other forms of non-notice and comment rules. And so what may end up happening is more ad hoc and less known law, and that's been long established that agencies have that choice.

The law doesn't force them to do notice-and-comment rulemaking, even if people think that would be a good idea in some areas. Some statutes do. Some statutes say regulations in a particular area have to go through notice-and-comment rulemaking, and often with deadlines, and then agencies do them. But a lot—usually interpretive rules are two or three layers down below a high-stakes promulgated regulation.

I just have one example that there was mention of the waters of the United States rule in Rapanos. The Supreme Court came with an extremely confusing decision. The Army Corps of Engineers and EPA immediately, or within a few months, tried to come out with a guidance document interpreting that ruling so people would understand how they understood an extraordinarily confusing decision. And not everyone would have necessarily agree with all aspects of it, but it brought greater clarity to the law.

Mr. COLLINS. But I think what we're looking at here, and, Mr. Brady, actually brought that—you know, even though you had a Supreme Court ruling that did sort of lay it out and, frankly, there were many people who understood what the Supreme Court was doing. I mean, we can lawyer everything, I lawyer everything to death, and you can as well. That's why there's a lot of problems in this.

The problem is interpretive rules have the full—they formally through court cases, lack the full force and effect of the law." But, you know, from a builder perspective, how many times have you had a building inspector come to your home or your building and give you an interpretive ruling on how high a fence was to be or how much—who is the law at that point?

Mr. BRADY. Well, they are usually the law, because they won't give me the sticker unless I interpret it the same way that they do.

Mr. COLLINS. Exactly. This is the problem we're getting at. And I'm not even sure anybody would like to take this on, is when we're looking at these, there could be issues—and, Mr. Clark, I think you had brought up an issue of actually doing it below a billion. Real quickly, is there a place where you would draw the line, on—Mr. Noe, either one—that would broaden the applicability of the REVIEW Act to below $1 billion. Is there a line below $1 billion? Like a number, do you have a number in mind? Mr. Clark. Mr. Noe.

Mr. NOE. I would recommend—you know, I respect if the Committee wants to have it only apply to the very small handful of rules it applies to now, but I would hope a least it's clear that it's total capital cost, whatever the number is. I think, frankly, there are a number of rules, though, that could effect small business or

other entities that when it hit that threshold. So it's for you to consider whether you'd want to lower that further.

Mr. COLLINS. Do all have a number in mind? Mr. Clark, do you?

Mr. CLARK. Yes, I would say that, you know, just as a quick, you know, thing. Suppose you considered it to be half, you know, $500 billion on a threshold that's ties to small business where that—you know, an impact of that magnitude could be catastrophic for small businesses so that you have sort of one speed for large businesses and one speed for small businesses.

Mr. COLLINS. Well, I think the biggest thing here, and I tried to get something from all of you here, as I'm closing up here is, simply is these rules, these interpretive rules, whether it's before the billion cap, non-billion cap, we're dealing with issues of real-world significance on. There is a cost-benefit analysis. There is something that to say that you do need this billion dollars and decide if we are going to have a suit or not, because otherwise, you can stop things. And for the interpretive reason, this says we need to take a look back. And I don't see anything wrong with an agency of any kind doing a comment open period so that we can get some of this clarified.

This is a good reason for this hearing, and, Mr. Chairman, I yield back.

Mr. MARINO. The Chair now recognizes the gentleman from Texas, Congressman Ratcliffe.

Mr. RATCLIFFE. Thank you, Chairman Marino.

Gentlemen, thank you all for being here today. The industries that you represent are essential to manufacturing in this country both with respect to job creation and economic growth, and they're certainly vital to the families in the fourth congressional district of Texas, which I'm honored to represent. So from my perspective, this hearing couldn't be more timely or more critical.

And, frankly, in hearings like this, I'm at a loss when I hear my colleagues on the other side of the aisle express concern about reforms that would force regulatory agencies to be more deliberative and more thoughtful, as if that's troubling or a bad thing. And I couldn't agree with you more, Mr. Clark, when you said that this is really a separation of powers issue. And I would certainly hope that folks on both sides of the aisle would agree that we'd be better off in this country if we were solving the problems that need solving in our communities, not by regulations legislated by unelected bureaucrats at unaccountable agencies, but instead by statutes legislated by an accountable Congress.

So let me turn to you, Mr. Noe, because the impact of your members, those in the paper and the wood products manufacturing industry, is a big economic driver in the fourth congressional district of Texas. I want to make sure that those businesses and the families that they represent aren't crushed by regulations that require not just millions, but in some cases billions of dollars in compliance costs. In your testimony, you talked about sustainability efforts that the paper and wood products manufacturing industry has had to take in recent years, and you talked about costly regulations from the Federal Government, and additional $10 million in new capital obligations that you expect will come in the coming years, and that that is a regulatory burden that you called unsustainable.

With that in mind, do you think that the REVIEW Act that we're considering, H.R. 3438, would actually incentivize agencies to work with stakeholders in the paper and wood manufacturing industry before issuing regulations thereby resulting in more legally sound rules and, in fact, significantly reducing regulation that we have in this country?

Mr. NOE. I absolutely do, Congressman, and I think you make a good point. I think what's being lost in the discussion about you should consider benefits as well as costs, is that we're talking about regulations that are later declared to be unlawful. Okay. And that creates tremendous waste of limited resources, which effects ability to hire, capital expansion. In other countries, to your point, my understanding, and I'm not an expert in foreign regulation, but there's much more of an accommodation, the regulators working with the industry on capital planning for highly costly rules. We have a very adversarial legal system where that doesn't happen as much as it should. And when it does happen, the stakes can be avoided.

The airbags rule that Ranking Member Johnson referred to, for example, you know, NHTSA actually originally made a mistake in those rules. And it considered the risks from high-force airbags, and there were a number of fatalities because of that. I'm not saying—I don't know enough of that to say the REVIEW Act could have to avoid that, but I know it would avoid mistakes that are made. And so we're talking about a bill that could lead to sustainable regulation, increase the legal soundness of it and really avoid mistakes, and that's where you're going to get real benefits.

If I could, I just want to show you from a distance. This is a picture of the clean air regulations, just one program of one agency that our industry faces in the next 10 years. This is what people face when they run companies in this country, and it's a scary picture

Mr. RATCLIFFE. Thank you, Mr. Noe.

Mr. Brady, your industry, the home builders that is important in my district and every district I would hope in this country. I want to give you an opportunity to expound on Mr. Noe's comments and answer the same question.

Mr. BRADY. Well, when I suggest 25 percent of the costs of a home is regulatory, it can tell you the burden that the regulatory environment puts on the cost of a product, which is an affordable housing issue, being able to produce a product in an affordable price. It affects the amount of people that I can put on the payroll, the amount of houses that I build and employ people to build those.

The regulatory burden—and as I said in my statement, we need to protect workers; we need to protect the environment, but the regulatory burden on our industry alone, is cutting affordability; it's cutting job creation. We have 240 members of our association 6, 7 years ago. We have 140,000 now, because many of those businesses, they are not around any more, in part because of the regulatory burden they have to live by.

Mr. RATCLIFFE. Well, I thank the gentleman. I wish I had more time to expound and highlight on these issues today. But I see my time has expired, so with that, I yield back Mr. Chairman.

Mr. MARINO. Thank you. Seeing no other Members present, this concludes today's hearing. I want to thank the witnesses for being here. It's very enlightening.

Without objection, all Members will have 5 legislative days to submit additional written questions for the witnesses or additional materials for the record. This hearing is adjourned.

[Whereupon, at 11:31 a.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

Response to Questions for the Record from Edward Brady, President, Brady Homes Illinois, testifying on behalf of the National Association of Home Builders

Responses to Additional Questions for the Record for Ed Brady
Submitted January 15, 2016

Ranking Member Conyers and Subcommittee Ranking Member Johnson

1. **You state that 25% of the final price of a new single family home reflects the cost of regulations "at all levels." Approximately how much of this amount results from federal regulations?**

A: The 25% figure comes from a survey of builder/developers who know how much complying with regulation cost them, but don't always know the source of the regulation. And even if you know that something is imposed by a local jurisdiction, it can be difficult to tease out the federal influence. How much of the increase in cost to do building code changes is due to the federal government's involvement in the code process? How much of local land use regulation is due to fear of losing grant or other funds if local jurisdictions don't federal guidelines?

2. **You cite various examples of construction restrictions. Are any of these mandated pursuant to federal regulation?**

A: The new "Waters of the U.S." change to the Clean Water Act along with the U.S. Fish and Wildlife's Service enforcement of the Endangered Species Act are two good examples here.

The Waters of the U.S. expansion of federal authority over water and land use will greatly increase the number of construction sites required to obtain a federal clean water act permit. This will delay or completely halt construction projects nationwide and slow economic growth.

As for the Endangered Species Act (ESA), the U.S. Fish and Wildlife Service and National Oceanic and Atmospheric Administration (collectively referred to as "the Service") can prohibit the issuance of any federal permit if the Service determines the proposed activity may result in the "adverse modification" of critical habitat. The designation of critical habitat by the Service is unlike other ESA regulatory restrictions in that the Service can designate private property as critical habitat regardless of whether a federally protected species will ever occupy the property in question.

3. **Do people typically decide to build homes or to purchase new homes in locations where there is extensive air or water pollution?**

A: I build homes according to consumer demand and am not aware of consumers seeking out locations where there is extensive air or water pollution. Instead it seems consumers value things like convenience to their job, convenience to friends and relatives. The 2013 American Housing Survey (AHS) offers some insight into consumer preference in the area.

Main Reason for Choice of Present Neighborhood	All Home Buyers	New Home Buyers
All reported reasons equal	23%	23%
House was most important consideration	21%	18%
Convenient to job	11%	13%
Convenient to friends or relatives	12%	11%
Safety of neighborhood	7%	9%
Not reported	7%	9%
Other	7%	4%
Other public services	4%	4%
Looks/design of neighborhood	3%	2%
Convenient to amenities	0%	2%
Convenient to public transportation	2%	2%
Good schools	3%	2%
Familiarity of neighborhood	0%	0%

Main Reason for Choice of Present Home	All Home Buyers	New Home Buyers
All reported reasons equal	30%	31%
Financial reasons	27%	18%
Room layout/design	11%	17%
Not reported	10%	14%
Size	6%	7%
Neighborhood	6%	6%
Other	4%	3%
Quality of construction	1%	2%
Yard/trees/view	3%	1%
Only one available	1%	1%
Exterior appearance	1%	0%

Response to Questions for the Record from William W. Buzbee, Professor of Law, Georgetown University Law Center

RESPONSES TO QUESTIONS SUBMITTED FOR RECORD
BY RANKING MEMBER CONYERS
AND SUBCOMMITTEE RANKING MEMBER JOHNSON

RESPONSES OF
WILLIAM W. BUZBEE
PROFESSOR OF LAW
GEORGETOWN UNIVERSITY LAW CENTER

SUBMITTED IN CONNECTION WITH HEARING HELD BEFORE THE SUBCOMMITTEE
ON REGULATORY REFORM, COMMERCIAL AND ANTITRUST LAW
U.S. HOUSE JUDICIARY COMMITTEE
UNITED STATES HOUSE OF REPRESENTATIVES
2141 RAYBURN OFFICE BUILDING

NOVEMBER 3, 2015; ANSWERS SUBMITTED JANUARY 12, 2016

HEARING ON H.R. 3438, THE "REQUIRE EVALUATION BEFORE IMPLEMENTING EXECUTIVE WISHLISTS ACT OF 2015"; AND H.R.2631, THE "REGULATORY PREDICTABILITY FOR BUSINESS GROWTH ACT OF 2015"

Responses of Professor William W. Buzbee

Please note: longer questions are restated in brief form.

1. Would the REVIEW act apply to transfer rules linked to budgetary programs such as Medicare and the Federal Pell Grant program if OIRA determines that they have costs in excess of $1 billion and hence would subject transfer rules and linked budgetary actions to stays upon filing of a legal challenge?

   Answer: Due to this bill's lack of definitions and failure to distinguish different sorts of regulatory costs or make clear that both benefits and costs must be examined, as well as the mandatory and automatic nature of stays ("postponement") without any preceding exercise of judicial oversight, this important question cannot be answered with any certainty. This question also highlights an additional major flaw with this bill.

   The bill's "triggering" language is, in its entirety, "any rule that [OIRA] determines may impose an annual cost on the economy of not less than [$1 billion]." It doesn't say "will impose," or explain the sorts of "rule[s]" it applies to, what "costs" means, or what "annual costs on the economy" means. Many judges today look at statutory texts and refuse to consider legislative history or through other means seek to discern legislative purposes. Hence, legislator motivations would likely be irrelevant to judicial application of this bill, were it to become law. So if any single litigant in the United States disliked some government budgetary choice possibly involving more than $1 billion, that single litigant might file a challenge in court and simply point to the alleged potential price tag and the fact (or claim) that a transfer "rule" is involved. Since this very skeletal bill lacks definitions of its central terms, and also contains no provision for judicial discretion or criteria for judicial application, judges might feel statutorily obliged to grant a stay. Actually, the bill is so lacking in clarity that it isn't even clear that a judge needs to act or could act. Perhaps the mere filing of the complaint would result in an agency obligation to "postpone" the rule; that is what it appears to require, although this would be problematic. Relatedly, when the stay or "postponement" would end is unclear; the term "pending judicial review" perhaps is meant to say until the judiciary completes its review, or maybe the first reviewing court issues a ruling on merits. However, since such a challenge could involve several stages of review, when the rule would or could take effect is uncertain.

2. What is your response to supporters of this bill who claim that it is unfair of them when they rely in good faith on an interpretive rule that is subsequently rescinded or substantially changed by the issuing agency?

   Answer: Since neither the original interpretive rule nor a changed interpretive rule creates binding law, but still often provides important guidance to industry, regulatory

beneficiaries, and agencies, a changed interpretive rule virtually always is responding to calls by some or many entities and people for that correction. It is rare for agencies to change much of anything without a nudge or call for change by agency constituencies. It is also rare that agencies make interpretive rule changes that are significant without substantial advance vetting of the change through speeches, web notices, and sometimes even entries and requests for comment in the Federal Register. Nonetheless, as indicated by the question, some entities might dislike the change or find the change unfair. What they should and likely would do is as follows: First, they likely would seek to influence the agency before the change, putting relevant information and making their best arguments before the agency. Smart entities would also start to make plans for a likely change, knowing they might not win. Prudent businesses always have to prepare for market and regulatory changes. Second, they can petition the agency to engage in a full notice-and-comment rulemaking. Third, if they view the interpretive rule change as contrary to the law, they can make that argument to the agency and, depending on what results from the rule, later to a reviewing court. The interpretive rule would not be binding law, as the Supreme Court made clear yet again in the recent *Perez* case mentioned by all of the hearing witnesses and several subcommittee Members. And, lastly, congressional oversight committees could also ask agencies about interpretive rule changes and, where appropriate, suggest changes.

But it is critically important to keep in mind that a change in an interpretive rule is likely responding to some broader need or call for that change; complaints by somebody do not mean the change is a bad idea. All regulatory choices result in some winners and some losers, and most of those winners and losers are businesses. For this reason, an across-the-board requirement of notice-and-comment rulemaking before changing an interpretive rule more than one year old would often frustrate and harm constituencies, often business interests, who typically are the ones seeking interpretive rules to provide greater regulatory clarity or a beneficial change. As I explore further in my submitted testimony, imposing new procedural burdens on agencies if they provide desired interpretive rules but then later want to change such a rule will not lead to a wave of notice-and-comment rulemakings. Existing interpretive rules would become rigidified even where changes might be desirable. In addition, agencies will also predictably become more reluctant to issue interpretive rules in the first place, even where such interpretive rules are broadly sought by agency constituents. Agencies would worry about future notice-and-comment burdens and would therefore seek to develop policy not through interpretive rules, but through less burdensome methods that might also be less clear and transparent than an interpretive rule.

3. What does "annual cost on the economy" mean?

Answer: I don't know what this phrase means. It is not defined and does not actually reflect common parlance or have a definition as a term of art. As indicated in my testimony, decades of advocacy of cost-benefit analysis are rooted in policy idea that agencies should not be imbalanced or blindered in their rulemaking, but should consider regulatory costs *and*

benefits. One-sided analysis of only costs (assuming we knew what that meant) is illogical and contrary to any respected views about cost-benefit analysis or other forms of regulatory impact analysis. And even if this is what is sought—namely, an imbalanced examination of costs alone—note that the REVIEW act bill's "postponement" is possible upon a mere OIRA determination that a rule "may impose" such costs. Since regulatory costs and benefits tend to be estimated in ranges and often with different scenarios and probabilities, this "may" language is itself a problem and creates yet another uncertainty.

4. Should the benefits of regulations be considered by an agency when issuing a rule?

Answer: Absolutely. Agencies should always provide a balanced assessment of whatever criteria Congress required in underlying legislation. And virtually all laws have as their overarching purpose provision of certain benefits in the form of sounder markets, a well functioning financial system, safer workplaces, a cleaner environment, reduced discrimination, effective use and stewardship of public lands, and safe products, to name a few areas of common regulation. So agencies must assess those benefits. They also typically have to assess an array of other variables, often including some specified types of costs and also, frequently, broader assessment of other anticipated impacts. While consideration of costs anticipated to result from regulation is usually sound policy and often required by law, they need to be assessed alongside regulatory benefits and other impacts or factors Congress enacted into law. This is both legally required and sound policy.